S. HRG. 102-5 (Pt. 10)

NATIONAL ENERGY SECURITY ACT OF 1991

(Section 5101 of Title V)

HEARING

BEFORE THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE

ONE HUNDRED SECOND CONGRESS

FIRST SESSION

ON

S. 341

TO REDUCE THE NATION'S DEPENDENCE ON IMPORTED OIL, TO PROVIDE FOR THE ENERGY SECURITY OF THE NATION AND FOR OTHER PURPOSES

MARCH 18, 1991

PART 10

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NATIONAL ENERGY SECURITY ACT OF 1991

(Section 5101 of Title V)

MONDAY, MARCH 18, 1991

U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 2:05 p.m. in room SD-366, Dirksen Senate Office Building, Hon. J. Bennett Johnston, chairman, presiding.

OPENING STATEMENT OF HON. J. BENNETT JOHNSTON, U.S. SENATOR FROM LOUISIANA

The CHAIRMAN. The hearing will come to order.

This is a hearing on section 5101 of S. 341, the National Energy Security Act of 1991. This section of the bill addresses the so-called WEPCo issue. WEPCo refers to a complex set of issues in connection with the Environmental Protection Agency's interpretation of new source requirements under the Clean Air Act. In particular, the term refers to EPA's determination of when a physical change at an existing stationary source results in an emissions increase.

A finding that the physical change will result in an emissions increase means that the source will be regulated as if it is a brand new source. This means that more stringent emissions control requirements will apply.

The problem with the WEPCo policy is EPA's skewed methodology for determining whether an emissions increase will in fact occur. Under this methodology, EPA will find an emissions increase in virtually every case. This will happen even where a power plant switches to a cleaner fuel or makes changes to promote increased efficiency.

We first got involved with WEPCo during last year's Clean Air Act debate. Our concern was that WEPCo would frustrate the purposes of the emissions trading scheme. This would happen because the WEPCo policy would preclude electric utilities from using some of the most cost effective compliance options, such as natural gas cofiring.

WEPCo is more than just a clean air issue. It is an energy issue. Perhaps our most important energy goal is the displacement of imported oil. EPA's WEPCo policy discourages electric utilities from making oil to gas conversions in cases where the conversion entails a physical change at the power plant.

Another energy goal is increased energy efficiency. The WEPCo policy discourages physical changes intended to improve power plant efficiency. Still another energy goal is to maintain the reliability of our electric generating system. WEPCo makes utilities take pause before undertaking projects that only a few years ago would have been considered ordinary maintenance.

While we did not get a statutory WEPCo fix as part of the Clean Air Act Amendments of 1990, we did get the administration committed to a comprehensive approach to this issue. Largely through the efforts of the Energy Committee, and in particular Senator Ford, the administration last summer proposed a comprehensive WEPCo fix.

We tried our best to get the Clean Air Act conferees to adopt that fix. Despite a letter from 31 Senators, including 12 members of the Energy Committee, the conference report was silent on WEPCo. Nonetheless, EPA Administrator Bill Reilly committed to the White House that, to the extent permitted by law, EPA would implement the administration's WEPCo proposal.

That gets us to where we are today. Section 5101 of S. 341 includes parts of the administration's WEPCo proposal that it has told us need statutory authority in order to be implemented. Although it is not part of the President's legislative proposal, WEPCo was included as part of the President's National Energy Strategy.

With that background, Mr. Schmalensee of the President's Council of Economic Advisers is here to tell the committee about the administration's progress in implementing the parts of the WEPCo fix that it represented to Senator Ford could be accomplished under existing law. We are anxious to hear Mr. Schmalensee's testimony, as well as today's other witnesses.

I have a statement from Senator Wallop, which I would like to put into the record at this point.

[The prepared statement of Senator Wallop and the text of section 5101 of S. 341 follow:]

Statement of
Senator Malcolm Wallop (R-WY)
Ranking Republican Member
Senate Committee on Energy and Natural Resources
March 18, 1991

Provision of Energy Security Act of 1991 Relating to
Applicability of New Source Review to
Existing Electric Utility Steam Generating Units

Today we begin the final round of hearings on the Energy Security Act of 1991. While the hearing process has yielded a wide variety of suggested approaches to structuring the components of a national energy policy, a predominant theme has emerged throughout our deliberations. We must ensure formulation of workable policies that encourage energy conservation and production free of regulatory constraints that interfere with logic.

The issue we address today, the so-called "WEPCO" problem, is a prime example of regulation run amok. When the Wisconsin Electric Power Company attempted to perform repairs on some of its aging boilers, it ran into a Clean Air Act regulatory policy that required a review of its repairs using standards normally applied to new sources. The consequence of falling within the requirements for new sources was that the company would have had to install the "best available control technology" in addition to the repairs or downgrade its capacity utilization.

EPA's short-term objectives interfere with the appropriate nexus between long-term national energy and environmental objectives. The current policy on changes at existing electric generating facilities will result in anomalies such as preclusion of cost-effective, pollution control projects. The policy could also discourage changes that would improve energy efficiency and conversions to cleaner fuels. Furthermore, the reliability of our entire electric system may be affected if companies faced with a WEPCO dilemma elect to retire facilities in lieu of making the changes necessary to comply with EPA's policy. Simply stated, the present policy makes no sense.

Certainly we should have learned by now that if government, albeit in pursuit of an otherwise laudable goal, interferes in the marketplace too drastically, it will create distortions that produce undesirable effects. That is the situation that we are presented with here.

Some of us attempted to remedy this problem in the last Congress without complete success. We should not let the opportunity pass once again. Energy policy concerns dictate the removal of the regulatory quagmire to permit sound business decisions on life extension and pollution control projects to be made while at the same time doing no violence to the goals of the Clean Air Act.

I look forward to hearing from today's witnesses.

II

102D CONGRESS
1ST SESSION

S. 341

To reduce the Nation's dependence on imported oil, to provide for the energy security of the Nation and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 5 (legislative day, JANUARY 3), 1991

Mr. JOHNSTON (for himself and Mr. WALLOP) introduced the following bill; which was read twice and referred to the Committee on Energy and Natural Resources

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A BILL

To reduce the Nation's dependence on imported oil, to provide for the energy security of the Nation and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be referred to as the "National Energy Security Act of 1991".

* * * * * * *

TITLE V—COAL, COAL TECHNOLOGY AND ELECTRICITY

* * * * * * *

Subtitle B—Electricity

SEC. 5101. APPLICABILITY OF NEW SOURCE REVIEW TO EXISTING ELECTRIC UTILITY STEAM GENERATING UNITS.—(a) POLLUTION CONTROL PROJECTS.—For purposes of the Clean Air Act, no physical change in, or change in the method of operation of, an electric utility steam generating unit which is undertaken for purposes of pollution control, including the use of natural gas and clean coal technol-

ogies, shall be treated as a modification for a specific regulated pollutant for purposes of part C or D of title I of the Clean Air Act if such change does not increase the potential emissions of the specific regulated pollutant from such source above the potential emissions before the change.

(b) NITROGEN OXIDE CONTROL REQUIREMENTS.—

(1) For purposes of the Clean Air Act, any modification, as defined in section 169(c)(2) of such Act, at an existing electric utility steam generating unit subject to section 165 of the Clean Air Act shall be deemed to satisfy the technology requirements of section 165(a)(4) thereof for nitrogen oxides if it meets the following:

(A) For a unit subject to a requirement promulgated pursuant to section 407 of the Clean Air Act, immediately following the modification, the unit shall be required to meet nitrogen oxide emissions limitation specified for that boiler type pursuant to section 407. In the event that the modification precedes the establishment of nitrogen oxide emissions limitations for that boiler type pursuant to section 407, the unit shall be required to meet the applicable emission limitation upon the date required by the regulation.

(B) For an existing electric utility steam generating unit not subject to section 407 of the

Clean Air Act immediately following the modification, the unit shall be required to meet the nitrogen oxide limit equivalent to the limit achievable using "low-NO_x burners".

(2) Any State or local permitting authority shall retain the right to impose more stringent limitations for control of nitrogen oxides.

* * * * * * *

The CHAIRMAN. Senator Craig, did you have any comments?

Senator CRAIG. I have none.

The CHAIRMAN. Well, with that, please proceed, Mr. Schmalensee.

STATEMENT OF RICHARD SCHMALENSEE, MEMBER, COUNCIL OF ECONOMIC ADVISERS, ACCOMPANIED BY DR. HOWARD GRUENSPECHT

Mr. SCHMALENSEE. Thank you very much, Mr. Chairman. It is a pleasure to have been given this opportunity to appear before you to discuss the complex issues that have come to be referred to as "WEPCo."

I trust my full written statement, although it is fairly brief, will be included in the record.

The CHAIRMAN. Your full statement will be included in the record.

Mr. SCHMALENSEE. I would just summarize it orally.

Your letter of invitation posed two specific questions: first, you requested a progress report on efforts to implement, insofar as possible through administrative action, the WEPCo fix outlined in my earlier testimony before the Subcommittee on Energy Research and Development; and second, you requested the administration's views on section 5101 of S. 341, which would change the new source review requirements for existing utility steam generating units. I will address both of those topics today.

I should perhaps, before proceeding to do so, identify Dr. Howard Gruenspecht from our staff, who is with me at the table today.

I will limit the scope of my remarks in several ways. First, I will not attempt to present a definitive legal view on the rather complex legal issues that swirl about this topic. Second, I will confine my focus, as in the earlier testimony, to the electric utility industry, as indeed section 5101 confines itself. And finally, I will spare you, Mr. Chairman, a repetition of the main points of my testimony last May and will simply build on that if I may, since the basic position of the administration on WEPCo issues has not changed since that time.

Let me begin first, if I may, with administrative action, where I would like to talk about principles, timetables, and content. As to principles, we have stressed from the beginning of discussion of this issue that we recognize the importance of resolving the uncertainty that the industry faces in this regard, and we have also discussed in general terms our approach to Clean Air Act implementation matters.

EPA has indicated its intention to exercise the discretionary authority which it is granted under the act in a manner consistent with the principles on which the President's clean air proposal was based. On issues where the administration's proposal was not adopted, positions were not adopted in the final legislation, which remain subject to interpretation in the rulemaking process, EPA has indicated that it intends to adopt as the basis for regulatory and other administrative actions the position reached by the administration during the clean air debate to the extent that position

is found consistent with the law and is supported by comments received in legislative rulemakings.

This latter intention obviously applies quite directly to the WEPCo matter.

Let me turn now to timetable. The administration is making substantial progress in pursuing a satisfactory resolution of the WEPCo issue through administrative means. I mentioned when I last testified on this issue that it was one of daunting complexity, and I must indicate to you that I have uncovered even additional layers since then.

But nonetheless we are making progress. We have reached internal consensus that the fullest possible implementation of our WEPCo proposal through rulemaking would be best achieved through promulgation of both a legislative rule and an interpretive rule.

As my statement indicates, there are advantages and disadvantages of both approaches. It is our sense that it makes sense to use both in this regard, with the substantive division between them being decided on the basis of the strongest overall package.

EPA is currently preparing an interpretive rule and a proposed legislative rule addressing WEPCo issues as they relate to electric utilities projects. All agencies in the administration are aware that rapid action is essential to allow for utility planning to meet the ambitious environmental goals set out in last year's Clean Air Act Amendments.

EPA has assured me that both the interpretive rule and the proposed legislative rule will be ready for publication in the Federal Register by the beginning of June. This rulemaking package will provide a clear and timely signal of EPA policy towards application of the modification rules in the electric utility sector. After agency consideration of comments received during the notice and comment period, EPA would then expect to issue a final legislative rule before the end of 1991.

Let me turn now to content. We continue to believe that a significant part of the proposal on WEPCo to which I testified last May can be implemented through this package of rulemakings. Since both the interpretive rule and the proposed legislative rule will be issued simultaneously, the outlines of the package will be clear and the composition of the package, the division between the two rules, will be dictated by our interest, as I said, in achieving the strongest possible package overall.

As to the contents of that package, it is perhaps useful to go back to a letter dated September 11, 1990, in which I responded to a number of queries from Senator Ford on my WEPCo testimony. Of particular relevance to today's hearing is my response to his question 3A, which asked about our ability to implement the elements of the administration's legislative proposal through administrative action.

As the administration moves toward implementation, administrative implementation, of its WEPCo proposals, these issues are now receiving close scrutiny by the administration's legal authorities. While the final legal analysis is still in preparation, at this time it appears that, with one important exception, the administration's view regarding what can and what cannot be accomplished

through administrative means has not changed from my earlier response.

The exception relates to the so-called safe harbor provision, which would allow certain non-routine physical or operational changes that were complementary to and contemporaneous with a pollution control project to be considered as an integral part of the pollution control project for new source review purposes.

My response to Senator Ford indicated that the safe harbor provision could not be implemented through rulemaking. I now understand, however, that much of this provision could in fact be implemented through rulemaking, depending of course on the record developed in the rulemaking.

At present, therefore, we believe that only two major elements of the administration proposal might not be implementable through rulemaking. One is the provision for systemwide netting, which turns on the definition of a source. The other is the provision for a generic BACT determination—that is B-A-C-T—for NO_x. In the latter case, EPA may be able to adopt through administrative action a presumption, which permitting authorities could override, that one or more particular technologies constituted BACT for NO_x.

Let me now turn briefly to the other question posed in your letter, Mr. Chairman, which concerns the matter of a possible legislative fix for WEPCo concerns. In the recently released National Energy Strategy to which you referred, the administration indicated that it would pursue a WEPCo fix through administrative means to the maximum extent possible and that it would also pursue a legislative fix for other elements of the package if necessary.

As I just indicated, it appears that it will be possible to implement a substantial part of the administration's WEPCo proposal through a combination of interpretive and legislative rulemakings. Clearly, legislation that enacted the administration's original proposal would increase certainty for the utility industry and would also bring into effect those elements of our proposal that cannot be implemented through administrative means. The administration would continue to view such legislation as desirable.

You also asked for our views on the WEPCo provisions contained in section 5101 of the omnibus energy legislation now before this committee. A comparison between this language and the administration's proposal of last July reveals the following differences.

First, section 5101 is much more concise and less complex than the administration proposal and may therefore in some respects provide clearer guidance to the industry.

Second, the coverage of section 5101 is more limited than that of the administration proposal. In particular, the administration proposal addresses power plant refurbishment and in general other projects that are not pollution control projects, whereas section 5101 does not.

Third, it has been argued that section 5101 may be less environmentally protective than the administration proposal, which applies a more stringent test for modifications in nonattainment areas than that proposed in section 5101. The administration pro-

posal does this by drawing a distinction between areas subject to parts C and D of Title I of the Clean Air Act.

Fourth, the administration's proposal has clear guidelines for the inclusion of contemporaneous non-routine changes as part of a pollution control project, while section 5101 does not. Section 5101 does not contain systemwide netting or generic BACT for NO_x.

And finally, the definition of a pollution control project appears to be somewhat broader in section 5101 than in the administration's legislative proposal.

Mr. Chairman and Members of the committee, thank you once again for giving me the opportunity to appear before you, and I would be pleased to respond to any questions you might have.

[The prepared statement of Mr. Schmalensee follows:]

TESTIMONY OF
RICHARD SCHMALENSEE
MEMBER, COUNCIL OF ECONOMIC ADVISERS

ON
TITLE V OF S. 341
NATIONAL ENERGY SECURITY ACT OF 1991

BEFORE THE
COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

March 18, 1991

I am very pleased to be given this opportunity to appear before you to discuss the complex set of issues that have come to be referred to as WEPCO. Mr. Chairman, your letter of invitation poses two specific questions. First, you requested a progress report on efforts to implement, insofar as possible through administrative action, the "WEPCO fix" outlined in my earlier testimony before the Subcommittee on Energy Research and Development. Second, you requested the Administration's views on Section 5101 of S. 341, the National Energy Security Act of 1991, which would change new source review requirements for existing electric utility steam generating units. I will address both of these topics today.

As in my previous testimony, I will limit the scope of my remarks in several ways. First, although I can summarize some initial legal thinking, I will not attempt to present a definitive legal view. Second, as the electric utility industry is the focus of most discussions regarding WEPCO -- and of Section 5101 of the legislation now under consideration by the Committee -- I will limit my remarks to the context of that industry. Finally, I will spare the Committee a repetition of the main points of my testimony of last May regarding such matters as the basic WEPCO issue and problems, WEPCO-related uncertainties, and the relationship between the new source review process and the new acid rain title of the Clean Air Act. Since the basic position of the Administration on WEPCO issues has not changed since May, my present testimony will repeat points made at that time only as necessary for clarity.

Administrative Action on WEPCO

My testimony regarding administrative action on WEPCO issues naturally falls into three distinct segments: principles, timetables, and content.

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Principles for Administrative Action

As you know, most WEPCO provisions were deleted from the Clean Air Act Amendments of 1990 prior to final passage by the Congress. The Joint Explanatory Statement of the Conference Committee noted that the deletion of these provisions was not intended to affect or prejudice in any way the issues or resolution of the WEPCO matter, and urged a quick and appropriate resolution. The Administration is also cognizant of other expressions of Congressional interest in a quick and appropriate resolution of the WEPCO issue, including a letter sent to the President last November by six members of this committee.

The Administration's approach to WEPCO will be no different from its approach to other Clean Air implementation matters. EPA has indicated its intention to exercise the discretionary authority which it is granted under the Act in a manner consistent with the principles on which the President's Clean Air proposal was based. On issues where Administration positions were not adopted in the final legislation, but which remain subject to interpretation in the rulemaking process, EPA intends to adopt as the basis for regulatory and administrative actions the position reached by the Administration during the Clean Air debate to the extent it is found consistent with the law and is supported by comments received in legislative rulemakings. This latter intention obviously applies quite directly to the WEPCO matter.

Timetable for Administrative Action

The Administration is making substantial progress in pursuing a satisfactory resolution of the WEPCO issue through administrative means. We have reached internal consensus that the fullest possible implementation of our WEPCO proposal through rulemaking would be best achieved through promulgation of both a legislative rule and an interpretative rule. I am advised that some elements could be best implemented through an interpretative rule, while a legislative rulemaking may be the best vehicle to implement others. The legislative rulemaking process is somewhat more time-consuming than the interpretative rulemaking process, since it requires that the issuance of a proposed rule be followed by a notice-and-comment period and subsequent agency consideration of the comments received prior to promulgation of a final rule. The advantages of the legislative rule approach include the benefits stemming from the receipt of informed public comment, the scope to implement more far-reaching changes in regulatory policy, and the greater deference typically accorded to a legislative rule by the courts should a legal challenge arise.

In this regard, EPA is currently preparing an interpretative rule and a proposed legislative rule addressing WEPCO issues as they relate to electric utility projects. EPA and DOE are both aware that rapid action is essential to allow for utility planning to meet the ambitious environmental goals set out in last year's Clean Air Act Amendments. EPA has assured me that both the interpretative rule and the proposed legislative rule will be ready for publication in the Federal Register by the beginning of June. This rulemaking package will provide a clear and timely signal of EPA policy towards application of the modification rules in the electric utility sector. After agency consideration of comments received during the notice-and-comment period, EPA would then expect to issue a final legislative rule before the end of 1991.

Content of Administrative Action

The Administration believes that a significant part of its WEPCO proposal can be implemented administratively through the package of rulemakings described above. Since both the interpretative rule and the proposed legislative rule will be issued simultaneously, the composition of the package will be dictated by our interest in achieving the strongest possible package overall.

In a letter dated September 11, 1990, I responded to a number of queries from Senator Ford. Of particular relevance to today's hearing is my response to Question 3A, which asked about our ability to implement the elements of the Administration's legislative proposal through administrative action.

As the Administration moves towards administrative implementation of its WEPCO proposals, these issues are now receiving close scrutiny by the Administration's legal authorities. While the final legal analysis is still in preparation, at this time it appears that, with one important exception, the Administration's view regarding what can, and what cannot, be accomplished through administrative means has not changed from my earlier response.

The exception relates to the so-called "safe harbor" provision, which would allow certain nonroutine physical or operational changes that were complementary to and contemporaneous with a pollution-control project to be considered as an integral part of a pollution-control project for new source review purposes. My response to Senator Ford indicated that the "safe harbor" provision could not be implemented through rulemaking. I now understand, however, that much of this provision could in fact be implemented through rulemaking, depending on the record developed in the rulemaking.

At present, therefore, we believe that only two major elements of the Administration proposal might not be implementable through rulemaking. One is the provision for systemwide netting, which turns on the definition of a "source." The other is the provision for a generic BACT determination for NOx. In the latter case, EPA may be able to adopt through administrative action a presumption, which permitting authorities could override, that one or more particular technologies constituted BACT for NOx.

Issues Surrounding WEPCO Legislation

The other question posed in your letter concerns the matter of a possible legislative fix for WEPCO concerns. In the recently released National Energy Strategy, the Administration indicated that it would pursue a "WEPCO fix" through administrative means to the maximum extent possible and that it would also pursue a legislative fix for other elements of the package if necessary. As indicated above, it appears that it will be possible to implement a substantial part of the Administration's WEPCO proposal through a combination of interpretative and legislative rulemakings.

Clearly, legislation that enacted the Administration's original proposal would increase certainty for the utility industry and would also bring into effect those elements of our proposal that cannot be implemented through administrative means. The Administration would continue to view such legislation as desirable.

You also asked for our views on the WEPCO provisions contained in Section 5101 of the omnibus energy legislation now before this committee. A comparison between this language and the Administration's proposal of last July reveals the following:

- Section 5101 is much more concise and less complex than the Administration proposal and may, in some respects, provide clearer guidance to the electric utility industry.

- The coverage of Section 5101 is more limited than that of the Administration proposal. In particular, the Administration proposal addresses power plant refurbishment, whereas Section 5101 does not.

- Section 5101 may be less environmentally protective than the Administration proposal, which applies a more stringent test for modifications in nonattainment areas than that proposed in Section 5101 (by drawing a distinction between areas subject to parts C and D of Title I of the Clean Air Act).

- The Administration's proposal has clear guidelines for the inclusion of contemporaneous nonroutine changes as part of a pollution control project, while Section 5101 does not.

- Section 5101 does not contain systemwide netting or generic BACT for NOx.

- The definition of a pollution-control project appears to be somewhat broader in Section 5101 than in the Administration's legislative proposal.

* * * *

Mr. Chairman and members of the Committee, thank you once again for giving me the opportunity to appear before you. I would be please to respond to any questions you might have.

The CHAIRMAN. Thank you very much, Mr. Schmalensee.

In his October 26th letter to Michael Boskin, Bill Reilly said the EPA would revise its draft rule within 4 months, which would have been February 26. Now we are talking June, I guess. Can you tell us why it takes so long to clarify this issue?

Mr. SCHMALENSEE. Well, Mr. Chairman, I have presided over several meetings in which I was one of the few nonlawyers in the room, and I have asked that question myself. I am told, however, by individuals with a variety of substantive views that there simply are some very difficult legal questions, in some cases tactical questions.

We are pushing, I believe, as rapidly as we can, and I think, frankly, it is a question of complexities, some of which we were not aware of really when we testified earlier; and second, of busy people doing many things, although that is not an adequate excuse.

But this I take to be a very hard deadline and we will treat it as such.

The CHAIRMAN. By the way, we are going to be through markup here and hopefully on the floor, have the bill over with by June. So your action, if June is complied with, it might be soon enough to do something in conference, I mean if we are able to realize our schedule. But then again, it might not be in the House bill, so it might be too late.

It is essential that you get some legislative fix? All of this could not be done administratively, could it?

Mr. SCHMALENSEE. No, Mr. Chairman. I tried to indicate in my testimony to the extent that I now can what parts of that earlier proposal will in substantial form be present, we now think, in the regulatory proposals and rules that will come out. But you are right, it cannot all be done.

I would point out that the commitment made on the interpretive rule was not to issue it by March 15th, but to have a draft within the administration. We do have a draft of the interpretive rule. But it is now clear that we need both an interpretive rule and a legislative rule and that there is no sense in considering either independently.

The CHAIRMAN. Well now, can you give us any assurances that the new WEPCo rule would not be merely a rehash of last year's rule that was so objectionable?

Mr. SCHMALENSEE. It is the understanding of all parties who have participated that the administration's commitment, EPA's commitment, is to implement so far as is consistent with the law and with the record developed in the notice and comment proceeding the legislative proposal we brought here.

To my knowledge no one in the course of drafting or discussing these new rules has started from or gone back to that earlier draft. It was clear, I think, last May what the administration's position was. It has not changed since then. I know no other way to give you assurance, except that I and a variety of other people, including those in EPA, are committed to a particular policy.

The CHAIRMAN. I gather from your comments that, while our legislative fix is not precisely what you think yours would turn out to be, that we are very much going in the same direction. You think ours would achieve the purpose, and do I gather that if this bill is

going to be through here before yours is completed that you think it would be a good idea for us to include ours as part of the legislation?

Mr. SCHMALENSEE. Mr. Chairman, the administration does not have a position on that provision. We had devoted our efforts to clarifying what we could achieve through an administrative approach. I certainly accept your comments at the outset that section 5101 moves in the same general direction as our proposal of last May. However, they differ in a variety of respects, as I tried to indicate. If only because of pride of authorship, we would of course prefer ours. But I have no position to report, Mr. Chairman.

The CHAIRMAN. I noticed it was part of the National Energy Strategy, but not part of the legislative bill. So that would tend to tell me that they are for a WEPCo fix, ours is almost like they want it, but they just do not have their legislation ready yet.

Mr. SCHMALENSEE. Well, Mr. Chairman, one of the complexities really is this question of deciding exactly what can be done administratively and what is best done legislatively. And we have not yet reached firm closure on that set of questions.

I think we are fairly close, but it would have been premature, I believe, given our view that we can do much of this administratively, to have put the residual or the apparent residual in the legislative proposal.

The CHAIRMAN. Under the administration's WEPCo proposal, would EPA's reconstruction rule continue to apply to a power plant that undertook physical changes?

Mr. SCHMALENSEE. I am not entirely sure——

The CHAIRMAN. The reconstruction rule says that if you spend greater than 50 percent of the cost of a new plant it is regulated as a new source.

Mr. SCHMALENSEE. It is my understanding that it would continue to apply, yes.

The CHAIRMAN. Senator Craig.

Senator CRAIG. Mr. Chairman, I have no question other than to say Christmas is coming, too, and that probably speaks well for my concern as it relates to the inability of the administration to get to the point of this issue. And I question at this time in all honesty whether it is EPA's effort to try to find a way around the intent of the legislation in the beginning, even though we have had a court ruling that says that the changes may have been sufficient to trigger a review, but there is a disagreement on the method of computation.

I almost read that by saying we wish to go further than was the original intent of Congress.

Mr. SCHMALENSEE. I am sorry, Senator? Who wishes to go further than was the original——

Senator CRAIG. I am suggesting that your inability to function—you can lay anything at the foot of an attorney and it does not bother me. I am not one of them. But I would suggest that there is a matter of practical application here that really we ought to be getting along with, and if you do not come up with something this committee certainly is going to make all effort to do so.

Mr. SCHMALENSEE. Senator, I appreciate your comment. I am not proud of our delay in this matter. I did not mean to particularly

blame the attorneys or to suggest ill will or a lack of intent to move forward.

But certainly we should have gotten farther by now, I agree.

Senator CRAIG. Mr. Chairman, let me only say in conclusion, the only ill will that ultimately gets generated is the ill will between the legislative and the executive branch. When it is clear, I think, as here, over an extended period of time what is the intent established in a given piece of legislation or in a change that we would allow, and then to see it handled the way it gets handled at the administrative level, I think that is where the ill will gets generated.

Thank you.

The CHAIRMAN. Thank you, Senator Craig.

Senator Wellstone.

Senator WELLSTONE. No questions right now, Mr. Chairman.

The CHAIRMAN. Senator Conrad.

Senator CONRAD. Mr. Chairman, thank you. Thank you for having this hearing, because this is an important issue and an issue that deserves to be addressed.

I would like to ask you, sir, about the impact of the WEPCo policy on the ability of utilities to implement the Clean Air Act of 1990 in the most cost efficient and effective way. I would be interested in what would you advise a utility executive who is perhaps today considering compliance strategies to proceed, given the present uncertainties due to the WEPCo issue.

And I do not ask this in an academic sense. I ask this because I have utility executives in my State who as recently as a week ago have come to me and sought my advice on what they should do on questions that involve literally tens of millions of dollars of decisions. And they are approaching the spring construction season and they are saying to me: "Senator, what is going to happen? Are you people going to clarify this or are we going to be hung with the current interpretation?"

How would you advise those people?

Mr. SCHMALENSEE. Senator, I would suggest that they have a problem.

[Laughter.]

Mr. SCHMALENSEE. And I could not be more sympathetic. If one were to assume that, as Senator Craig suggested, Christmas will arrive when promised, then I believe the combination of my testimony today and a look at our proposal of last May would indicate fairly clearly what the administration hopes to accomplish administratively and what it is we will be proposing on June 1st.

They could rely on our ability to effect that policy and proceed as if it will indeed be adopted. They could, however, also recognize that this has been an issue marked by delay and uncertainty for some time, and could attempt to plan for a worst case scenario, that this situation would not be clarified.

Perhaps because I am close to the process, I would be inclined to advise the first course. Perhaps I would be too close to do that in an objective manner, and I would agree with your assertion, implicit assertion, that the differences in costs between planning for a worst case WEPCo rule and planning for the administration's proposed policy could in many cases be substantial. The environmen-

tal effects, the environmental difference between those two situations, given the other parts of the act, would be negligible. So I share your sense of urgency.

Senator CONRAD. Well, let me just emphasize, when Senator Craig said Christmas is coming that struck a chord with me, because indeed Christmas is coming and the weather conditions attendant to it in my part of the country are coming. That is why it is so critical.

I mean, we have in my part of the country, and Senator Craig's part of the country, Senator Wellstone's, a window of opportunity to do things, and it is a relatively short window of opportunity in terms of a construction season. And when you are talking about tens of millions of dollars of capital expenditure, people need to know what is the best course for them to follow.

I can tell you, we are dealing in a situation in my State in one plant that we are talking about a question that involves tens of millions of dollars, and we need an answer and we need it expeditiously.

If you could—just as a last question, Mr. Chairman; I know you have got other witnesses here—could you put some probability with respect to this being determined through an administrative process? You indicated several alternatives. What probability would you put on option 1?

Mr. SCHMALENSEE. Well, I think the probability is quite high that rules as I described them or the package having the basic provisions I indicated will appear in the Federal Register by June 1st.

Senator CONRAD. And be effective?

Mr. SCHMALENSEE. Be effective by the end of the year. Remember, we are going to propose both an interpretive rule and a legislative rule. EPA will have to take public comments on the legislative proposal. It will have to react responsibly to that comment.

EPA's judgment is that if the draft legislative rule is published June 1, after review and consideration of the public comments that the final rule could be issued by the end of the year. The interpretive rule, of course, would be effective sooner. But there are the obvious tradeoffs. The interpretive rule would be accorded less deference by the courts should there be a judicial challenge.

Senator CONRAD. Let me just say that when we get that answer it is confusing to some. Beyond confusing to some, perplexing at least.

Did this not all start with an EPA determination that altered the previous determination, the previous interpretation? And if that is the case, why can it not be changed by reinterpretation that goes back to where we were before?

Mr. SCHMALENSEE. Senator, I have learned more about this history, than I believe anybody would ever want to know. There is a considerable debate as to whether and when EPA changed an interpretation.

Senator CONRAD. Well, is it not fair to say that the Wisconsin Electric case and their decision with respect to that——

Mr. SCHMALENSEE. The Wisconsin Electric case ratified an EPA policy, which some say is a continuation of a policy adopted in the early 1980's but not tested until considerably later. It is, however, the opinion of lawyers of all stripes, that is to say from all the

agencies involved, that we simply cannot—that it would be unwise to attempt to implement all of the provisions of the administration's proposal by interpretive rulemaking.

The CHAIRMAN. And those rules can be and would be challenged in court, which would give you another delay.

Mr. SCHMALENSEE. Which is another reason, of course, for going through the notice and comment process.

The CHAIRMAN. And those rules do not deal with the potential-to-potential problem. This potential-to-potential problem, you know how that works, and you know how also the NO_x works under the BACT. And not only would it probably require a selective catalytic reduction, BACT—as I am told, under the present law BACT means in effect selective catalytic reduction, which has two problems.

First, it costs five times as much as a scrubber; and secondly, it takes you 18 months to 2 years to find out the answer as to whether it is required. Is that not right?

Mr. SCHMALENSEE. It is not my understanding, Mr. Chairman, that the current law necessarily requires it. It is my understanding that there is a fair amount of uncertainty, and that was one reason why we in our original proposal dealt with that.

The CHAIRMAN. Well, it takes a plant by plant review.

Mr. SCHMALENSEE. Right.

The CHAIRMAN. And that in turn takes 18 months to 2 years. And my advice is that they would probably require selective catalytic reduction, but at least it would take you the long time to find out.

Mr. SCHMALENSEE. To find out, yes.

Senator CONRAD. Mr. Chairman, if I just might. You know, if we were executives running a several hundred million dollar facility—we have examples of that in my State—and in good faith you wanted to comply with the laws of the United States, and at the same time you did not want to bankrupt your facility and you did not want to devastate the consumers of that facility, the need for some sense of what is in fact required of you is pretty critical, and to know that at the earliest possible moment is pretty important.

And I can tell you, we are wrestling with the situation in my State right now where there is a facility that has got to make decisions that are in the tens of millions of dollars, and they do not know what to do.

Is it the chairman's judgment—I assume it is—that we just are going to have to have a legislative fix? We cannot wait for an administrative fix?

The CHAIRMAN. Oh, I think that is right. You see, the administration will be out, they say, in June with the rulemaking and with a legislative package. They recognize that a legislative package is also essential. Is that not correct?

Mr. SCHMALENSEE. We will produce an interpretive rule and a legislative rule. I do not think a decision has been made whether we would introduce legislation at that time.

The CHAIRMAN. Oh, by legislative rule you mean——

Mr. SCHMALENSEE. Notice and comment.

The CHAIRMAN [continuing]. Notice and comment?

Mr. SCHMALENSEE. Yes, sir.

The CHAIRMAN. But the BACT problem that I just described would require a legislative fix, would it not?

Mr. SCHMALENSEE. It would, Mr. Chairman. As I indicated in my testimony, it appears that by rulemaking EPA could establish a presumption, but that presumption could be overturned.

The CHAIRMAN. And that rulemaking surely would be traversed in court, so you would have another 2 years in court probably of uncertainty while it worked its way through the courts. I mean, we need not only some relief, but we need some answers, and fast answers.

So I do not see any way to get away from a legislative fix for this thing. I mean, whatever we do, at least make it final.

Mr. SCHMALENSEE. I would not disagree with you, Mr. Chairman. As we indicated during the course of the clean air debate and in my earlier testimony, we felt that a legislative solution would be quickest and most sure, and that indeed is why we offered what we thought was a sound package in that regard.

We are proceeding without such a fix to do what we can administratively.

The CHAIRMAN. Mr. Schmalensee, thank you very much for your testimony.

If no one else has any questions, I hope you, and I know you will, keep us advised of any change in views on the administration and any progress being made. Thank you very much.

Mr. SCHMALENSEE. Thank you, Mr. Chairman. And I will convey the committee's sense of urgency to my colleagues.

The CHAIRMAN. Thank you very much.

Senator CRAIG. Thank you.

The CHAIRMAN. Next we will hear from a panel with David G. Hawkins, Senior Attorney for NRDC, and Anthony J. Ahern, Manager of Environmental and Technical Assessment Division of the American Electric Power Services Corporation, from Columbus, Ohio.

Gentlemen, welcome to the committee. Mr. Hawkins, why do you not lead off.

STATEMENT OF DAVID G. HAWKINS, ON BEHALF OF THE NATURAL RESOURCES DEFENSE COUNCIL

Mr. HAWKINS. Thank you very much, Mr. Chairman, and thank you for the opportunity to communicate these views of the Natural Resources Defense Council on this important issue. Let me try to highlight my testimony in a brief opportunity.

First, I come appreciating the frustration that the committee feels over this issue and over the length of time that it seems to be taking to resolve this issue. Perhaps it will help if I attempt to articulate some of the important environmental objectives that cause this controversy to arise in the first place. Understanding the reasons for an action may help to figure out ways to achieve the same result a little more quickly and with a little less uncertainty.

The environmental objectives really came into the Clean Air Act in 1970, when the Congress adopted a dual program of regulation of pollution sources. Existing sources would be regulated in a fairly flexible, fairly lenient manner quite often, in order to meet air

quality standards, but not have any minimum technological requirement and not have any preoperational review for their air quality impacts.

In contrast, new sources of pollution would be reviewed prior to construction and they would be subject to a technology requirement that is intended to apply state-of-the-art pollution control technology in order to minimize their emissions.

Now, the new source controls were adopted to achieve two purposes. The first purpose was to protect local air quality, to make sure that a new pollution source did not create a new pollution problem or did not make an existing pollution problem worse. A pollution source located, for example, next to a national park or a wilderness area would be reviewed beforehand to make sure that it did not destroy the air quality values of that park. Similarly, a pollution source located in a downtown, urban, polluted area would be reviewed beforehand to make sure that it did not increase public health air quality violations. And both of those sources would be required to apply state-of-the-art emissions controls.

The reason for that latter condition was to minimize the air quality impacts, minimize the emissions, and to reflect the fact that the cheapest time often to install controls is when you are engaged in planning and investment in a project in the beginning, rather than going back and trying to fix it after the fact.

This means that over time—and Congress was assured of this fact back in 1970—as existing plants retired, national and regional pollution levels would gradually go down because they would be replaced by plants that would be controlled with state-of-the-art pollution controls, so eventually all plants would be controlled with state-of-the-art pollution controls, and that would lead to lower emissions, it would mean that we could have a more thriving economic growth with minimal environmental damage associated with that, and we could keep this engine running to keep the economic growth going without accompanying it with more and more and more pollution for every dollar GNP increase.

So this was the concept and one that we think made and makes a lot of sense. Now, the rub is, where do you draw the line between an existing source and a new source? And that is where this concept of modification comes in, and the issue that we are all discussing today is what EPA has attempted to do, to interpret "modification," which has been expressed in statutory language and expressed in regulatory language, but it needs to be interpreted according as applied to the facts in the real world.

And EPA has adopted a policy which many, if not all, in the industry are saying, A, is too strict, and B, creates too many uncertainties. So those are the arguments against EPA's rule, and I am sure we will hear those arguments amplified by my colleague.

But the arguments in favor of a tight approach rather than a lenient approach stem from the environmental needs. If we have too lenient an approach, if too many investment decisions at existing sources can be made, then both local air quality and long-term air quality improvements can and will suffer.

For example, if a plant can refurbish itself and decide to operate at a 60 percent capacity factor rather than a 30 percent capacity factor, real world actual emissions could double, and those doubling

of emissions will increase pollution loads on the nearby area. Those pollution loads can either cause deterioration in a pristine air quality area or they could exacerbate an existing violation of ambient standards in an urban area.

Now, Mr. Ahern in his testimony says, well, let us use the State implementation plan process and call on a revision of the State implementation plan to fix those problems. That is theoretically possible, but I would submit is the less desirable option, because that actually increases uncertainty and increases costs, because under that scenario you let the project go forward, you let it create the pollution problem, and then you trigger a regulatory process which comes back after the fact and tries to get that plant and maybe a bunch of other plants in the area to put on retrofit control technology to bring pollution loads back down to where they were before the project went forward.

And all of those new pollution control rules have to be applied to the plant that has already made these investments, that has already bought the equipment, that has already designed the equipment, and you are coming back after the fact and saying: Now fix it.

That is not a way to increase certainty, it is not a way to minimize costs.

Similarly, if these modifications can occur under the rubric of being an existing source, we will see a pattern of delaying retirements and the turnover of the old, relatively poorly controlled stock of plants will be delayed and may never occur. And instead of getting the gradual reduction in total emissions loads that the country is counting on, we will not get them. We will stay with the status quo.

I have noted in my testimony that in the acid rain control program, yes, we will get some reductions in sulfur dioxide, but we are not going to get reductions below current levels in NO_x emissions or in particulate emissions, two of the other important pollutants associated with these modifications.

While a lot has been made of the impact of these provisions on pollution control projects and clean coal technology demos, to us the heart of the issue are the investment decisions that involve restoring lost productive capacity or expanding capacity. We think those decisions need to be made on an environmentally level playing field.

Company operators should not be induced to patch up existing boilers because the pollution control rules are more lenient and choose that as an option instead of going forward and building new, more efficient, and cleaner facilities. And both of those options are going to be available. When a company makes its resource plan, they are going to look at different options to produce the necessary capacity to meet their demand projections.

If they choose to patch up an existing boiler, that is fine with us, but we want it to be done on an environmentally level playing field. We do not want them to be induced to choose that path because the pollution control rules are more lenient, because all that does is let them externalize the pollution that is associated with that path.

In the testimony I have tried to highlight some of the specific concerns we have with the specific proposal and, rather than going into those in detail, I would just invite questions and response. Let me say that we think both the proposal in S. 341 and the administration's proposal are entirely too broad, that each of them would allow significant actual emissions increases that could have adverse air quality effects on a local scale, both in polluted urban areas and in the pristine environmental areas.

Let me just make one correction to my testimony at pages 6 and 7, with respect to the question of the BACT rules and the generic provisions. There is a reference to new source performance standards in there and that should be stricken. The generic rules in both the S. 341 and in the administration proposal apply to BACT and not to NSPS.

Some specific proposals that are in the administration proposal and not in S. 341 I would like to just take a moment to comment on. The first is a proposal for systemwide netting out of review. This would allow actual increases to occur at one plant and be "offset," and I will put that in quotes, by emissions reductions elsewhere in the utility company's system.

In our view, that is entirely inappropriate because what it does is shift a pollution burden from one group of people to another. We think it is no comfort to the citizens, for example, of Cincinnati to have an emission increase occur in Cincinnati and be told that emission reductions have occurred in Detroit and they should be happy. That is not an adequate way to protect the rights of the individual voters in Cincinnati and we do not think it is an acceptable approach.

We think you have to have an approach that protects against localized air quality impacts and you cannot equate them with improvements in emissions elsewhere.

The second element that is in the administration proposal that is unique is, in calculating emissions for the future the administration would exclude emissions associated with demand growth. This we think is a particularly perverse idea. It is demand growth which ought to operate on an environmentally level playing field.

If utilities are making investments to meet new demand, they ought to look at all the options on an equal basis: a new power plant versus patching up an old power plant versus purchasing power from an IPP versus renewables versus energy efficiency. Each of those ought to be evaluated subject to the same environmental rules and we ought not to give a subsidy to one of them.

The subsidy, first of all, differentially affects different industries, and why do we want to have legislated a policy that hands out a subsidy to some energy companies, namely the ones that happen to have older, low capacity units, and denies that subsidy to some of the power plant operators in the growth regions of our country that have all-new plants and all high capacity plants? They will not benefit from these environmental subsidies.

More importantly to us as environmentalists, the environmentally superior options of energy efficiency and renewables will be totally disadvantaged by this kind of approach. Indeed, under the administration's proposal a company that did a good job of conserving energy, of introducing energy efficiency, would have a lower

demand growth and therefore it would not get the same benefit that a company that did a lousy job of promoting energy efficiency. That is just the wrong signal that we want to send to the community.

Well, let me conclude, Mr. Chairman, by saying that, in response to your point about the need for prompt resolution, it is not at all clear to me that the legislative route is the fastest route to a solution. Legislation can become very controversial. Legislation can be the subject of many different committees wanting jurisdiction. Legislation on this issue, which is a controversial Clean Air Act issue, may re-arouse the many sleeping giants out there and not so big entities to come back and say, well, we now have some additional Clean Air Act items that we would like to get back on the table as long as you are talking Clean Air Act.

This could make it fairly complicated, and indeed it could slow down the administrative resolution of these issues, as in my view it appears to have done in the last Congress when, once legislation was put on the table, EPA sort of slowed down in its attempts to solve this problem.

So I would urge that all of us try to find an effective way of getting EPA to sit down with the interested parties and see if we cannot hammer out a solution to this problem, one that meets the concerns that I have tried to articulate and one that meets the concerns that I believe Mr. Ahern will articulate.

Thank you very much.

[The prepared statement of Mr. Hawkins follows:]

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Testimony of

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NATURAL RESOURCES DEFENSE COUNCIL

on S. 341

before the

US SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES

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Mr. Chairman, members of the Committee, I am David G. Hawkins and I am here today on behalf of the Natural Resources Defense Council, an environmental advocacy organization with 170,000 members in the United States. Thank you for inviting me to present NRDC's views on provisions of S. 341 relating to application of the Clean Air Act new source rules to modifications of existing pollution sources, abbreviated as the "WEPCO" issue.

While mountains of regulatory and other legal submissions have been generated regarding the "WEPCO" issue, the core of the matter is simply stated. What types of pollution-increasing changes at an existing plants warrant the application of the Clean Air Act's more demanding new source pollution control rules to the plant's future operations?

The WEPCO issue exists because the Clean Air Act regulates new pollution sources fairly strictly but "grandfathers" most existing sources from the stricter requirements. The Act's differing treatment of new and existing sources deserves a few words of background.

In 1967 the Johnson Administration proposed to Congress a program of national, technology-based emission standards that would have covered both old and new sources. Congress opted instead for a program of state regulation of all sources based on largely state-defined air quality standards.

In 1970 Congress enacted the dual program of control that in broad outline remains the law today. Under the current Act new sources are required to install "best demonstrated" or "best available" control technology and must be reviewed before construction to assure that they will not cause or exacerbate ambient air quality standards or cause significant deterioration in areas with clean air.

In contrast, existing sources as a general matter are controlled only to the degree necessary to bring existing polluted areas into compliance with national ambient air quality standards.[1]

When this dual approach was adopted in 1970 it was explained as allowing states the flexibility to come up with varying control requirements for existing sources that would reflect the different capabilities of older sources to install and operate control technologies, while at the same time subjecting new sources to tighter controls to insure that they would not create new pollution problems. In addition, the retirement of existing sources over time would mean that eventually all sources would operate under the tighter new source control rules.

Thus, the Act's new source control program has two important environmental purposes: in the near term preventing newly-created pollution problems on a local scale; and in the longer term, achieving steady reductions in the regional and national pollution burden as new plants replace old ones. NRDC's view is that these are important and necessary

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[1] Controls for especially toxic air pollutants and now acid rain precursors, are exceptions to this general rule.

environmental objectives and that both EPA's current rules and proposals to address the "WEPCO" issue should be tested for their impacts on these program goals.

WHAT IS A MODIFICATION?

Because existing sources are grandfathered from both the air quality review and the tight control technology requirements of the new source program, the ability of the program to achieve its environmental purposes hinges on the treatment of investment projects at existing sources. In the terms of the statute and EPA's rules, the key issue is what investment projects will be classified as a "modification" of the source.

As you have heard from others, the Act and EPA's rules employ a two-step test to determine if a project is a modification. First, the project must involve a nonexempt[2] physical or operational change. Second, the project must be found to result in an increase in emissions. While there have been some disputes regarding whether certain actions constitute "routine maintenance," most of the controversy has raged over EPA's methods for determining whether an emission increase will result from the proposed project.

EPA calculates hourly emission rates to determine applicability of New Source Performance Standards (NSPS) and annual emissions totals to determine if the New Source Review requirements of the Prevention of Significant Deterioration or Nonattainment programs apply.

To determine whether emissions will increase, EPA looks at emissions before and after the proposed project. Prior emissions can be determined with some accuracy in most cases but arguments arise over which prior periods should be used to represent the "baseline" for the existing source.

The problem is more difficult for future emissions because neither the pattern of actual emission rates nor the actual hours of operation during each year can be known in advance. In the absence of any enforceable basis for calculating a lower figure, EPA projects future emissions using the source's allowable emissions rate and its capacity at full operation rates. This figure is termed the source's "potential" emissions and is used to forecast future emissions unless the source agrees to accept a lower enforceable figure.

Source operators protest this approach, asserting that their plants will rarely, if ever, operate at full capacity year-round. Undoubtedly, this is true in many cases but the method EPA has chosen to calculate future emissions seems reasonable compared to the alternatives presented to date. Historic emissions will be underestimates, and documentably so, when a project expands the capacity above current levels or when public filings or other factors show a plan to operate well above historic rates.

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[2] Certain changes are expressly exempted under EPA's rules, e.g., routine maintenance, increases in hours of operation, shifts to alternate fuels that the source has preexisting capability to burn.

Accepting the source operator's forecasts of future operating rates might seem at first blush to be a reasonable alternative. But will the source operator agree to permit provisions to make its forecasts enforceable? EPA will use lower rates to calculate emissions if the operator will accept enforceable requirements to honor those rates. It does not seem reasonable to ask the government, the environment and the public to live with a source operator's pollution forecasts when the operator himself is unwilling to live with them.

Source operators argue that EPA's approach has led to unreasonable results, subjecting pollution control projects and "Clean Coal Technology" demonstration projects to new source review requirements. While there is reason to look for improved ways to assess the impacts of such projects, the issues are not simple, even for pollution control projects.

Consider a project that refurbishes a aged boiler and installs a scrubber (or switches to lower sulfur coal) as part of a program plan to increase its capacity factor from 30% to 60%. While this project may reduce SO_2 at the site[3], unless other steps are taken, it will double emissions of nitrogen oxides and particulate matter. If this fact is completely ignored by EPA the result would be to substitute two potential pollution problems for one.

Regarding "Clean Coal Technology" projects, while many such projects may result in actual emission reduction of one or more pollutants, this is not categorically true. Consider the project to construct a fluidized bed boiler at a unit that was mothballed years ago (and thus emitting nothing) or the proposed project to convert an existing gas-fired plant to coal.[4] Both of these projects would result in significant increases in actual air pollution at the site -- an impact we submit should not be ignored simply because the project bears a "clean coal" label.

But pollution control projects and "clean coal" demonstrations are not the centerpiece of the WEPCO debate.

The real policy issue involves whether existing plants will be allowed to be completely overhauled, increasing capacity substantially above current generating capability, and extending their operating life for 20-30 years or more, all without taking steps to prevent pollution increases at those plants.

The electric utility industry has been making major efforts over the last ten years to develop effective methods to extend the lifetimes of existing units far beyond their initial design life. This may well be economically rational but why is it reasonable to undertake such major new investments and insist on continued application of the existing source "grandfather" clause of the Clean Air Act?

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[3] Under the acid rain program such reductions may free up allowances to permit emission increases elsewhere.

[4] The latter project was abandoned when its sponsors refused to do an environmental impact statement.

Investing to extend the life of an existing unit is a utility resource decision and like other resource decisions it should be made based on full consideration of all the costs of the life-extension proposal compared to other options for balancing supply and demand for electric power. However, if a WEPCO exemption were to insulate such investments from new source review, all the costs of the proposal would not be considered. Instead the costs of the added pollution resulting from continuing "grandfather" treatment would be ignored, providing a hidden subsidy for this approach and tilting the playing field unfairly against other options.

Broad WEPCO exemptions would harm important energy objectives, including promotion of competition in the supply of electricity and encouragement of greater reliance on renewables and demand management resource options. In essence, expansion of exemptions from new source review amounts to a selective subsidy to a segment of the industry, favoring those who happen to own aging, low-capacity-factor generating units. Such companies would be able to meet expanded demand by restoring lost capacity at existing plant sites, using the existing source "grandfather" clause to avoid pollution control costs.

In contrast, other companies, including both utilities and independent power producers, that are proposing new sources to meet expanded demand will be required to meet the more stringent new source requirements. Some such companies may be bidding competitively for supply contracts against the very companies now seeking broad WEPCO exemptions. Under this approach, some companies would be allowed to continue externalizing the environmental costs of expanded generation while other companies would be required to internalize more of such costs for the same expansion in capacity.

The environmental and cost-saving advantages of renewables and demand-side management also would be discriminated against
under a policy that would exempt capacity increases from new source review. Renewables and efficiency projects will be selected or rejected based on cost comparisons with other options. If the costs of life-extending existing units are kept artificially low by grandfathering such projects from pollution controls, then fewer renewables and efficiency projects will be selected.

THE ENVIRONMENTAL COSTS OF WEPCO EXEMPTIONS

While this Committee has heard much about the costs of too stringent a definition of "modification," I want to address the environmental harm that would result from too lenient a definition of "modification." If existing sources are allowed to undertake projects that increase emissions or that substitute for building a new source and still be treated as an existing source, air quality in the near term and the long term would suffer.

Expansion or overhauling of existing polluting equipment can result in large actual increases in pollution. If the impacts of these increases are not reviewed before the project goes forward, existing violations of public health standards could be made worse, new violations could be created and air quality in nearby clean areas, including parks and wilderness areas, could be seriously degraded.

In addition, if extensive modernization, refurbishment or life-extension projects can be undertaken without applying new source control technology, then the replacement of old plants by new, on which the new source program's longer term pollution reduction depends, will be delayed or may never occur.

Some have argued that the just-enacted acid rain control program adequately addresses the pollution control objectives of the new source program. We do not agree.

As to the near-term objective of preventing new and modified sources from causing serious local air pollution problems, the acid rain program provides no protection. Acid rain controls will be implemented under an allowance program that would permit substantial emission increases at one plant as long as reductions are achieved elsewhere. Since there is deliberately no requirement under the acid rain title that trades occur in the same region there can be no basis for assuming that local air quality will be protected by the fact that total national allowances do not increase.

Nor does the acid rain program adequately substitute for the objective of longer-term national and regional reductions of power plant pollutants. The acid rain title requires significant reductions for only one pollutant, sulfur dioxide (SO_2). The other two major regulated pollutants from power plants, nitrogen oxides and particulate matter, are subject to modest or no reductions and unlike SO_2, their total future amounts are not capped.

COMMENTS ON SPECIFIC PROPOSALS

S. 341

Section 5101 of S. 341 (the Johnston-Wallop bill) would amend the Clean Air Act to provide two broad exemptions to electric utility steam generating plants.

New Source Review

First, it would exempt, pollutant by pollutant, from the New Source Review requirements of the Prevention of Significant Deterioration (PSD) and Nonattainment programs, any project at an existing unit "which is undertaken for purposes of pollution control," if the change does not increase the potential emissions of the pollutant. By requiring EPA to compare emissions on a potential to potential basis, this amendment would result in many projects with large actual increases escaping any review for their air quality impacts.

The limitation to projects "undertaken for purposes of pollution control" unfortunately does little to limit the scope of the exemption. The language expressly includes the "use of clean coal technologies" in the scope of the exemption. But the Clean Air Act definition of "clean coal technology" does not require that it actually reduce pollution compared to what it replaces; for example, converting a gas-fired boiler to fluidized-bed coal would qualify as a clean coal technology but would greatly increase emissions.

The general language, "undertaken for purposes of pollution control," also encompasses many other projects that would increase actual emissions. Under the acid rain program, which permits emission trading and establishes a utility industry ceiling on SO_2 emissions, virtually any project can be claimed as "undertaken for purposes of pollution control." For example, refurbishing an old boiler to increase its capacity and extend its life so that generation can be reduced at other plants, could be argued to be for the purpose of pollution control.

We do not oppose utilities taken such steps to meet acid rain control targets. However, if the projects increase actual emissions at a given location, there should be no blanket exemption from new source review, for this could result in serious adverse local pollution impacts.

Under the amendment large actual emissions increases would be permitted no matter how sensitive the location. Thus, in an urban area, an existing boiler could be rebuilt in a way that might double or triple actual pollution releases and result in major violations of public health standards. Similarly, an existing boiler near a National Park or Wilderness Area could dramatically increase actual emissions with no prior review to protect air quality.

Nitrogen Oxides Controls

The second exemption in S. 341 is even broader in scope than the first. Subsection (b) of section 5101 establishes a special, lenient definition of required new source control technology for nitrogen oxides (NO_x), applicable to any modification at an existing steam generating unit, regardless of the character or pollution impact of the modification.

Rather than being required to use state-of-the-art (BACT) controls to reduce NO_x as other new sources must do, all modifications at existing utility steam generating units would need only to meet the lenient existing-source NO_x limits of the acid rain title.

Under the amendment, projects that increased actual and potential emissions on an hourly and on an annual basis, all would be exempt from meeting NSPS or BACT NO_x limits applicable to other new or modified sources. By encouraging utilities to structure their capacity expansion programs as modifications at existing units, the amendment effectively would repeal the Clean Air Act new source NO_x technology requirements for companies that own aging power plants.

Apart from introducing competitive distortions by providing special regulatory treatment for some companies, the amendment would have serious long-term environmental consequences. Unlike SO_2, which the acid rain program will reduce substantially in the mid-term, NO_x emissions are increasing regionally and nationally and will not be reduced from 1980 levels under the acid rain title. The amendment in S. 341 would exacerbate the rise in NO_x emissions by allowing large segments of the electric utility industry to expand generating capacity and apply only mediocre NO_x emission control to that expanded generation base.

NO_x emissions contribute to acid rain, to urban and rural ozone, to visibility degradation and are involved in atmospheric processes that produce greenhouse gases. The

many nations, including the U.S., that have signed the NO_x protocol to the 1979 Geneva Transboundary Air Pollution Convention have acknowledged the need to do more to reduce NO_x emissions. Yet the amendment would put the U.S. on a course of allowing increased NO_x pollution.

The Administration Proposal

In July 1990, the Administration provided this Committee with legislative language for a WEPCO "fix" that the Administration supported as a component of the then-pending Clean Air Act Amendments.[5] Congress did not include the proposal in the amended Clean Air Act and for good reason.

The Administration proposal provides electric utility steam generating units with five exemptions from the Act's new source requirements:

- an exemption from NSPS for certain sources;
- an exemption from PSD for "pollution control projects;"
- an exemption from PSD and nonattainment review for projects other than pollution control projects;
- an exemption from NO_x BACT and NSPS requirements; and
- an exemption from EPA's general rules for calculating emissions increases.

NSPS exemption:

This provision would exempt projects from NSPS even though actual hourly emission rates increase, provided that the increased rates do not exceed the "maximum hourly emissions achievable" at the unit during the previous five years. To the extent that this language would allow a source to select an extreme, abnormally high emissions hour and use it to justify an exemption for a project that would result in future emissions rates higher than average pre-modification rates, this would result in large actual emissions increases.

PSD exemption for "pollution control projects":

This provision would exempt from PSD, pollution control projects and "piggyback" expansion/life-extension projects up to 20% of total project costs, if the project would not increase maximum hourly emissions above "past maximum hourly emissions."

Compared to S. 341, the term "pollution control project" is more narrowly defined, being limited to changes undertaken "for purposes of reducing emissions from such unit." (emphasis added). Thus, this language, by itself, would not cover projects that were not designed to reduce pollution at the unit being modified.

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[5] Letter of July 23, 1990, from Richard Schmalensee, Council of Economic Advisors, to Senator Wendell H. Ford.

The provision's "past hourly maximum emissions" language is subject to abuse, for it would allow a source that plans to initiate an expansion in, say, 1992, to deliberately set out to increase maximum hourly emissions at the existing source for a few hours in 1991 to create an artificially high baseline in order to receive the exemption. In addition, the 20% "piggyback" provision has no apparent policy justification; it is simply a way of shoehorning significant non-pollution-control investments in under the label of "pollution control projects."

Beyond these concerns, the maximum hourly increase test will seldom if ever, disqualify sources from exemptions because of the next provision in the Administration proposal, which exempts sources even if their hourly emission rates do increase.

PSD and Nonattainment NSR exemptions for other projects:

This provision would exempt modifications from new source review (NSR) in both PSD and polluted urban (nonattainment) areas even if the project resulted in increases in maximum hourly emission rates, subject to an apparent requirement that "significant net increases in representative annual emissions" not occur.

However, for most if not all projects, the no net annual increase test is a sham test. The Administration proposal allows a source to satisfy the "no annual increase" test by taking credit for reduced emissions at other sources in the state or in the company's operating system ("system-wide netting"). Because the acid rain program independently requires emissions reductions for SO_2 and NO_x, most if not all projects would automatically satisfy the "no annual increase" test by pointing to its acid rain emission reductions.[6] Thus, the "no annual increase" test would provide no incentive for sources to limit emission increases at the modified source.

This provision could easily result in a project causing large pollution increases in a polluted urban location or next to a pristine National Park and avoiding new source controls by pointing to acid rain emission reductions hundreds of miles away. If this were allowed, the public would properly conclude that acid rain cleanup was being accomplished at the expense of increased pollution in urban areas or sensitive parks and wilderness areas.

In addition to the threats to health and pristine air quality resulting from such local pollution increases, it seems very shortsighted to jeopardize public attitudes toward the market-based approaches in the acid rain control program by allowing such fundamentally unfair shifts of pollution burdens. Moreover, since under the Administration proposal, specific acid rain SO_2 emission reductions would be dedicated to offsetting increases at specific modification projects, a tracking system would be required to insure that emissions from the reducing sources did not subsequently increase. This could impose a major restriction on the ability of sources to freely trade acid rain SO_2 allowances.

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[6] Moreover, as discussed below in the testimony, the Administration definition of annual emission increases would exclude increased emissions due to increased source operating rates in an amount equal to system demand growth rates. Thus, total system emissions as well as local emissions could increase.

The Administration proposal contains language authorizing air quality reviews to determine whether ambient air quality standards or PSD increments would be violated. However, there are two major defects in the language as drafted. First, the analysis is discretionary, not mandatory. Second, the language does not provide EPA or state reviewing agencies with any clear authority to prevent or condition construction of the modification project even if analyses demonstrate that health standards or PSD increments would be violated.[7]

NO_x BACT exemption:

This provision is identical in pertinent respects to Section 5101(b) of S. 341.

Emissions increase calculation methods:

The Administration would define increases in "representative actual annual emissions" to exclude increases in emissions from expanded operation of the modified source in an amount "equal to the rate of electricity demand growth for the utility system as a whole."

As discussed above, the Administration's "system-wide netting" proposal would allow large emission increases at the modified source. By adding a demand-growth exclusion, the Administration proposal would not even require the modification's entire actual emission increase to be offset elsewhere. Thus, a company with annual system demand growth of 3% per year could modify an existing plant to increase its hourly emissions by any amount and increase its annual emissions by 34% and not be required to offset these emission increases either at the site or anywhere else.

Not only would this approach create serious local pollution problems, it would discriminate against companies that were successful in implementing energy efficiency programs. The better job a company does in reducing forecasted demand by implementing cost-effective demand-sided programs, the less of a pollution subsidy it would receive for plant modifications. Thus the demand-growth exclusion would give utility managers another reason to decide against pursuing energy efficiency programs. This would be a truly perverse set of incentives to create for the industry!

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[7] The Act provides such authority only with respect to new or modified sources. However, the Administration proposal specifies that projects passing the enumerated emissions increase tests are not "modifications," without reference to the results of any discretionary modeling analysis. Accordingly, a source operator could argue that it is not subject to any preconstruction restrictions under the Administration language, regardless of the results of modeling analyses.

CONCLUSION

In our view both S. 341 and the Administration's legislative WEPCO proposals would have major adverse environmental and energy policy consequences. We would feel it essential to vigorously oppose enactment of either of these proposals.

More broadly, we do not believe that further legislative responses to the WEPCO issues are either necessary or effective means of resolving remaining controversies in the area.

The just-amended Clean Air Act contains specific exemptions from NSPS for repowering extension projects under section 409. Section 415 provides exemptions from NSPS, PSD and nonattainment review for temporary "clean coal" demonstration projects and exemptions from NSPS and PSD review for permanent repowering demonstration projects.

In addition, EPA has publicly stated its intent to address other issues relating to modifications in an interpretative rule and possible proposed rulemaking.

Far from accelerating resolution of remaining issues, it is likely that pursuing additional legislation on these issues may slow up the administrative decisionmaking process.[8] In addition, attempts to reopen the Clean Air Act debate, especially on a contentious issue like WEPCO, may propel all sorts of interest groups with unfinished air pollution agendas back to these halls. Industry, state agencies, environmental, labor, and public health organizations could all list many clean air issues they would consider trying to persuade the Congress to reconsider if they were given the opportunity.

The issues involved in defining the term "modification" are complex, with links to a variety of Clean Air Act provisions. In this testimony I have tried to demonstrate that the WEPCO provisions of S. 341 and the Administration proposal would damage desirable environmental and energy policy objectives, even though the provisions were not drafted with those objectives. If Congress pursues specific statutory change on this complex issue, it may well discover after the fact that it has written into law, provisions with unexpected and undesirable consequences either for environmental protection or for a sound, competitive and secure energy policy.

I hope that you will reconsider the need to legislate in this area and instead urge EPA and interested groups to meet in a serious effort to resolve these issues on a basis that all can accept.

Thank you and I will be happy to respond to your questions.

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[8] Based on materials published in the October 27, 1990 Congressional Record, EPA has had draft documents addressing these issues prepared for months. The administrative process apparently was not completed because the Administration decided to pursue a legislative solution.

The CHAIRMAN. Thank you, Mr. Hawkins.
Mr. Ahern.

STATEMENT OF ANTHONY J. AHERN, MANAGER, ENVIRONMENTAL AND TECHNICAL ASSESSMENT DIVISION, AMERICAN ELECTRIC POWER SERVICES CORP.

Mr. AHERN. Thank you, Mr. Chairman and committee members.

My name is Tony Ahern and I am with American Electric Power, and today I am here on behalf of American Electric Power, the Edison Electric Institute, the American Public Power Association, the National Rural Electric Cooperative Association, and the National Coal Association. They and I would like to commend this committee for holding these hearings on the applicability of new source requirements to the existing utility units, the WEPCo policy, which we have already heard a great deal about in the short time that we have been here.

The message that I have to deliver on the WEPCo issue is an appeal for environmental rationality. A lot of people theorize and hypothesize what WEPCo means, but I can tell you as a utility we see it as an issue that very much clouds up actual decisions that we are going to have to make, not just hypothetical decisions but real decisions, particularly decisions in response to the Clean Air Act.

What is wrong with WEPCo is that it is not defined as a policy. Instead, WEPCo is emerging as a series of ad hoc, case by case, after the fact determinations.

I want to say one thing up front. I am going to give some examples that relate to the Clean Air Act, but I do not want to mislead you. The broad sweep of the WEPCo policy has serious implications for the electric utility industry well beyond compliance with the Clean Air Act. It will affect the full range of utilities' operating practices, and that is the point of my message today.

We have been encouraged by Administrator Reilly's October 26th, 1990, commitment which has already been discussed, to address the WEPCo issue, and the Administrator indicated that he would consider revising the agency's position and that that revision would be in harmony with the administration's overall approach in the 1990 Clean Air Act, which the Administrator noted was directed towards "achieving environmental objectives in the most cost effective way to ensure that our national aspirations for economic growth are not compromised."

But as it now stands, EPA's WEPCo interpretations have numerous significant implications, not only for the electric utility industry in particular, but for America's long-term energy security in general. Now I would like to discuss some of these, some examples of these implications.

First, WEPCo threatens the emissions trading program and will hamper the introduction of pollution control projects and even clean coal technology projects. American Electric Power, like a lot of other utilities that are "Phase I-affected utilities" under Title IV of the Clean Air Act Amendments of 1990, are presently engaged in trying to develop their comprehensive compliance strategies. For many utilities like AEP, trying to determine where scrubbers

might fit in with their compliance plan is a real decision that they now face.

When we look at the deadlines for Phase I, which is 1995, we ask the question: Will the installation of scrubbers require new source review? Because if it does, I honestly do not see how any utility could install a scrubber and meet the Phase I compliance deadline. There simply is not enough time.

I will give you an example of the time constraint. EPA has established the Acid Rain Advisory Committee. In fact, Mr. Hawkins is one of the 44 members of that. Another member is Mr. James Hambright, who is the Director of the Bureau of Air Quality Control for the Pennsylvania Department of Energy Resources.

At one of his recent ARAC meetings, Mr. Hambright reported that he had gone back and looked at Pennsylvania's record on the time required to process new source reviews. The last 17 new source reviews that the State of Pennsylvania conducted, the average time that it took them once they received a complete application was 470 days.

Now, it takes about a year to a year and a quarter to prepare a new source review submittal. So what we are talking about is, if new source review is required for a scrubber—and by the way, if a new source review is required, you cannot start any work on that scrubber until that review is completed—we are talking about adding 2½ years.

If a utility is zeroing in on a compliance decision, say for a scrubber, by mid-1991, they would not physically be able to start construction on that scrubber until about 1994. And it typically takes 30 to 36 months to construct a scrubber. They are going to be hard pressed to have that scrubber in service by 1997.

Even though there is provisions in the Clean Air Act for some extension allowances, if you are following that situation it is very murky who will get those extension allowances and how many they will get.

Another thing that is concerning utilities is even fuel switches are problematic, because fuel switches often require changes. And as we see the WEPCo policy emerging, it appears to be something that homes in and looks for changes. And sometimes, in some of the fuel switch scenarios, there are substantial financial investments that need to be made in order to accommodate fuel switches.

A second example of where WEPCo has serious implications is in the area of fuel conversions, and I am talking about all types of fuel conversions. I just alluded to a fuel switch perhaps to a lower sulfur coal, but there are other fuels that the utilities would like to consider in their compliance plans, and principal among them is natural gas, either as a direct shift or as cofiring.

My personal opinion is that prohibiting a fuel switch to natural gas is environmentally irrational, but yet this is what WEPCo pushes all of us in the direction of.

A third example is WEPCo, supposedly in the name of environmental protection, is discouraging productivity and encourages inefficiency. In this respect, the EPA staff has indicated that work designed to "reduce maintenance and down time and to enhance the reliability of pollution control" may trigger a new source review.

Remarkably, this conclusion was announced in the context of a proposal to upgrade pollution control equipment, which is something that had been going on for years under the Clean Air Act regulatory program without any new source review.

Back to the Clean Air Act, Title IV specifically encourages efficiency improvements and, as a matter of fact, Eileen Clausen, who is in charge of EPA's acid rain compliance activities, has stated at an ARAC meeting that the agency will have failed if it did not achieve substantial efficiency improvements. But yet, that appears to be one of the very triggers for new source review.

EPA's efforts post-WEPCo to expand the scope of the new source programs creates tremendous uncertainties needlessly. If every project undertaken to reduce down time and improve efficiency or productivity can no longer be taken without EPA review and approval or serious regulatory consequences, American industry will find itself in a less competitive position.

The fourth example is that WEPCo threatens the reliability of electric supplies at a time when many are predicting in the latter part of the 1990's energy shortages, capacity shortages, in various parts of the country. The agency's WEPCo interpretations can contribute to declining reliability by hampering cost effective maintenance programs, in essence by intimidating people into not making the types of changes or modifications to maintain the reliability of their equipment.

EPA has recognized that it has the discretion to implement the changes of the WEPCo policy through administrative means. I strongly agree that EPA can and should revisit the WEPCo interpretations through immediate and comprehensive administrative action that should clarify the correct meaning of the current rules.

If that action takes the form of notice and comment rulemaking, it is important that the preamble to any proposed rule reflect certain key areas that the WEPCo interpretation depart from past agency practice. In my written testimony I mention four or five areas that need to be addressed.

So in summary, the efforts of the committee to include a WEPCo fix in S. 341, although for the reasons I have just mentioned, the current language does not completely address—let me rephrase that.

We appreciate the efforts that the committee has made to include a WEPCo fix in S. 341, although for some of the reasons I have just mentioned the current legislation does not completely address all of the concerns of the industry. Whether more expansive legislation is necessary will be largely driven, of course, by whether EPA, consistent with its October 26th commitment, eventually develops its new interpretation, although from what we have heard earlier from Dr. Schmalensee, that looks like it will not be in a timely fashion.

We urge the committee to include in S. 341 broad WEPCo relief like that sponsored by you, Mr. Chairman, and 30 of your colleagues last fall. A provision providing broad relief could be modified in any final bill if EPA fulfills its commitments. However, if EPA's actions are not adequate, meaningful legislative relief from WEPCo will be needed to realize the broad energy objectives of S. 341.

Thank you for your interest and attention. I would be pleased to answer any questions that you may have.

[The prepared statement of Mr. Ahern follows:]

TESTIMONY BEFORE THE UNITED STATES SENATE
COMMITTEE ON ENERGY AND NATURAL RESOURCES
S. 341 NATIONAL ENERGY SECURITY ACT OF 1991

by

Anthony J. Ahern, P.E.
American Electric Power Service Corporation

Mr. Chairman, members of the Committee, my name is Anthony J. Ahern. I am the manager of the Environmental & Technical Assessment Division of the American Electric Power Service Corporation (AEP). I appreciate the opportunity to appear here today on behalf of the American Electric Power System; the Edison Electric Institute, the trade association of the nation's investor-owned utilities; the American Public Power Association, the trade association of publicly-owned utilities; the National Rural Electric Cooperative Association; and the National Coal Association. We commend you for holding this hearing to explore the important issue of applicability of new source review to existing electric steam generating units -- the Environmental Protection Agency's (EPA's) so-called WEPCo policy.

AEP is one of the largest electric utility systems in the United States, providing electrical service to seven million people in seven states stretching from Michigan to Tennessee. Ninety percent, or 21,000 MW, of our generating capacity is fueled by coal. These units burn all types of domestic coal -- from high and low sulfur eastern coal to the Powder River Basin

low sulfur coal. AEP's coal-fired capacity is approximately seven percent of the entire coal-fired utility capacity in the United States. Our coal-fired plants have been built on the "series" concept. That is, as our customers' electricity demands grew, we added new generating units by replicating a design at a number of installations. As technology progressed, and economy-of-scale gains could be realized, we would then design a new sized unit which would be duplicated in other areas of our service territory. For the most part, the AEP system in service today was created by building a large number of 200 MW units, followed by a series of 600 MW units, then progressing to 800 MW units, and finally completed with our current design, 1300 MW units. Each series of units has its own unique characteristics and operating experiences.

The AEP System not only operates and maintains its coal-fired units, but it is one of the few utilities that performs a majority of the design and construction of its units.

Our power plants are among the most efficient in the nation, which means that we are able to produce the electricity our customers need with less coal. Our intimate involvement with both operations and maintenance, and the design and construction of the generating units, has resulted in above-average reliability of our units. Our 1300 MW coal-fired Mountaineer

Plant has set the world's record for the longest continuous run of any generating unit with 607 days of continuous operation.

The developments of the last few years involving the WEPCo issue raise serious concerns for the electric utility industry. Of particular concern to me and, I am sure, to this Committee, is WEPCo's effect on the ability of the electric utility industry to meet the nation's electricity needs in a cost-effective, reliable, and environmentally rational manner.

Beginning in fall 1988, EPA began to issue a series of decisions which found that certain alterations of existing power plants, both physical and operational, were modifications and major modifications which triggered the application of New Source Performance Standards (NSPS) and Prevention of Significant Deterioration (PSD) review pursuant to Section 111 and parts C and D of the Clean Air Act. These decisions charted a new direction in the application of existing regulations. These EPA decisions applying EPA's new NSPS and PSD policy are collectively referred to as WEPCo.

EPA first expressed its WEPCo policy in the Wisconsin Electric Power Company Port Washington plant decision. Port Washington involved the replacement of certain large boiler components, air pre-heaters and other equipment on the five small units located at that site. EPA determined that since the

replacement was "costly" and "non-routine," NSPS applied. In making its decision, EPA defined "costly" as an expenditure of over 5% of the original cost of the steam generating unit. Since EPA did not even account for inflation, 5% of the cost of a steam generating unit built many years ago is a remarkably small sum of money by today's standards.

EPA also determined that PSD applied. Its PSD determination was based on a comparison of actual operating emissions of admittedly aged plants versus full load operation for 365 days per year, 24 hours per day. No unit could pass this test since customer demand patterns do not require plants to operate at 100% load throughout the entire year, and even the newest, best maintained units usually experience occasional curtailments. The practical effect of EPA's policy at Port Washington was that WEPCo lost the youngest of the five units at the site, which the utility decided to permanently shut down. As for the other four units, they did not reduce NO_x and achieved only a marginal reduction in particulate matter, at the cost of a substantial period of delay.

The U.S. Court of Appeals for the Seventh Circuit upheld EPA on appeal of the Port Washington plant decision on the NSPS issue but reversed on the PSD issue, holding that EPA could not assume round the clock maximum operations at an existing facility with an operating history. EPA has nonetheless gone on its way to

expand the current policy, by simply limiting the Seventh Circuit's decision on PSD to "like-kind" replacements. In addition, EPA has applied its WEPCo logic to oil-to-natural gas fuel switches and clean coal technology projects.

As I mentioned previously, EPA's WEPCo policy marked a change in the application of existing regulations. Prior to the fall of 1988, new source review was applied to (1) an increase in emission rate above design levels, (2) enlargement of an existing unit, and (3) construction of new units. EPA did not attempt to compare past actual emissions with future potential emissions if a source had been in operation for some time.[1/] For instance, as recently as 1988, the Agency did not apply the PSD modification rule when an oil company reactivated two petrochemical plants that had been shut down for a decade.[2/] Prior to 1988, under EPA applicability decisions, facilities could switch fuels from oil to gas without worrying whether new source review would be triggered.[3/] In WEPCo, by contrast, EPA's application of such an "actual-to-potential" approach was precisely the basis for its determination that the proposed

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1/ Memorandum from Edward E. Reich to Michael W. Johnson (July 28, 1983).

2/ Letter from Christopher J. Daggett to Pedro A. Santiago Rios (May 4, 1988).

3/ Letter from Edward E. Reich, EPA Director, Division of Stationary Source Enforcement, to Amasjit Gill, General Electric (June 24, 1981).

activities at the Port Washington units would trigger new source review.

The Agency has thus fundamentally changed its previous approach, and has created an entirely new regulatory regime that is not clearly defined nor understood by this nation's industry. This is reflected in EPA's reluctance to communicate its view of the law to the regulated community. According to John Calcagni, Director of EPA's Air Quality Management Division, in 1989, the Agency would not publish something about its application of new-source emission standards to changes and repairs of old plants because anything in writing could be dissected by attorneys in search of loopholes.[4/] As a result, utilities cannot be certain how broad the sweep of the EPA policy is and thus cannot fully predict the consequences of altering any physical aspect of a power plant, or its operations.

At the outset, I would like to address the argument that new source review is required at an existing unit increasing its utilization in order to protect local air quality from deterioration. This argument, while often advanced by both EPA and various groups in support of the Agency's WEPCo interpretation, strikes me as being a "red herring."

4/ Power Engineering, February 1990, p. 21.

In the first place, the modification rules were never intended to preclude existing units from increasing their utilization unless their utilization was constrained by a "federally enforceable" permit term. Prior to WEPCo, EPA had never suggested that the PSD rules have the effect of capping utilization below maximum production levels whenever a unit undertakes repairs that do not enlarge the production capacity of the unit or increase its historical emissions. Indeed, in an economy that contemplates that industry can and will respond to changes in market conditions, existing sources must be able to undertake repairs needed to meet increased market demand in the least costly and most efficient manner, without incurring the delays that would result from new source review.

Moreover, on the merits, a finding that an increase in emissions does not constitute a modification by no means authorizes the source to exceed PSD increments or ambient standards. The obligation of a source to comply with ambient requirements is entirely independent of the source's obligation to meet new source review requirements.

Furthermore, EPA has always determined compliance with short-term (i.e., three-hour, 24-hour) ambient requirements using maximum hourly emissions. As for annual emissions, most emission limitations were derived assuming operations 365 days a year, at theoretical maximum production levels; even where limitations are

not predicated on such assumptions, annual ambient standards and increments are rarely limiting.

As a consequence, an increase in utilization of a unit above historical levels but still below theoretical maximum operation would not be expected to threaten compliance with ambient requirements. In any event, where increased utilization of a unit threatens local air quality, EPA's rules require that the State Implementation Plan (SIP) be revised to contain any more stringent limits needed to protect a PSD increment or to attain an ambient standard. This requirement is independent of the modification rules.

We are encouraged by EPA Administrator Reilly's commitment, in his letter of October 26, 1990, to the Chairman of the President's Council of Economic Advisers, that the Agency will revise its WEPCo policy. The Administrator indicated that his Agency's revised position would be in harmony with the Administration's overall approach to the 1990 Clean Air Act Amendments, which, the Administrator noted, was directed toward "[a]chieving environmental objectives in the most cost effective way to ensure that our national aspirations for economic growth are not compromised."

As it now stands, EPA's WEPCo interpretation has numerous, significant implications not only for the electric utility

industry in particular, but for America's long-term energy security in general. I would like to discuss briefly some of these implications.

First, WEPCo threatens the emissions trading program and hampers the introduction of pollution control projects, including those involving "clean coal" technologies. My company, for instance, is presently engaged in devising a comprehensive compliance strategy -- which may involve the installation of scrubbers on one or more units -- in time to meet the deadlines for Phase I sulfur dioxide requirements under Title IV of the 1990 Clean Air Act Amendments. The installation of scrubbers will likely motivate increases in capacity factors; indeed, the allowance trading program encourages increased capacity factors at lower emitting units. If installation of such controls are to trigger new source requirements or even review to determine new source applicability, the attendant delays would jeopardize our ability to meet the Phase I requirements and could force us to abandon plans to scrub where that strategy was cost-effective. EPA's draft interpretive ruling on pollution control projects, which was circulated within the Administration late last year, would not solve the problem.

Second, the WEPCo interpretations are hostile to voluntary fuel conversions from oil to lower emitting and lower cost fuels, such as natural gas, and to coal/natural gas co-firing.

Prohibiting a switch to natural gas appears to be environmentally irrational.

Third, WEPCo has the curious effect, ostensibly in the name of environmental protection, of discouraging productivity and promoting inefficiency. In this respect, the EPA staff has indicated that work designed to "reduc[e] unit maintenance and downtime" and "to enhance the reliability of . . . pollution control" may trigger new source review.[5/] Remarkably, this conclusion was announced in the context of a proposal to upgrade pollution control equipment, something that has been going on for years under the Clean Air Act regulatory programs without any "new source" regulatory consequences.

EPA's effort, post-WEPCo, to expand the scope of new source programs strikes close to the heart of American industry, at a time when the country finds itself struggling to keep apace with foreign competitors. The point is, if every project undertaken to reduce downtime and improve efficiency or productivity can no longer be undertaken without EPA review and approval or serious regulatory consequences -- both involving significant delay -- American industry will find it difficult, if not impossible, to compete in world markets.

5/ Memorandum from J. Calcagni, Director of EPA Air Quality Management Division, to D. Kee, Director of EPA Region V Air and Radiation Division (November 3, 1989).

Fourth, WEPCo threatens the reliability of electricity supplies at a time when many forecasters are predicting that electric energy shortages will occur in the 1990s in many parts of the United States. The Agency's WEPCO interpretations contribute to declining reliability by hampering cost-effective maintenance programs, promoting operations at progressively lower capacity levels, and forcing early retirement of plants without acquiring replacement capacity. My company, for example, has long employed an aggressive program of unit maintenance and repair on virtually all components of our power plants, in order to ensure a reliable and efficient supply of electricity for our customers. EPA's WEPCo interpretations are in direct conflict with AEP's philosophy of how it should best achieve that goal.

EPA has recognized that it has discretion to implement changes to its WEPCo policy through administrative means. Given the adverse consequences, just mentioned, that we in the utility industry face from WEPCo, and given the continuing shadow of uncertainty that this policy casts over our industry, I strongly agree that EPA can and should revisit its WEPCo interpretations through immediate and comprehensive administrative action.

If that action should take the form of notice-and-comment rulemaking, it is important that the preamble to any proposed rule address the following matters, drawn generally from the Administration's legislative proposal, a similar version of which

was supported by you, Mr. Chairman, as well as by nearly one third of the full Senate last fall.

First, EPA's draft interpretive rule on pollution control projects provides inadequate relief for pollution control projects. Under that draft, to be exempt from PSD review a pollution control project could not lead to increased utilization of a unit. This would cast a regulatory cloud over controls that improved performance or reduced costs (e.g., some fuel switches).

EPA's modification rules under § 111 provide an unqualified exemption from modification for environmentally beneficial control programs. Since the PSD provisions of the Act incorporate the § 111 definition, EPA can provide complete relief through an interpretive rule that reads the § 111 exemption as an implicit exception to the PSD modification definition.

This, in fact, was EPA's original 1983 interpretation of its PSD rules. In 1986, however, the Director of EPA's Office of Air Quality Standards and Planning reversed the 1983 ruling by EPA's Associate General Counsel for Air and Radiation, William Pedersen. The Agency can and should return to the Pedersen interpretation and remove any impediment to pollution reduction programs at utility plants.

Second, in calculating emissions increases for purposes of PSD, EPA should acknowledge that its attempt to restrict the Seventh Circuit's WEPCo holding to "like-kind" replacements is not a fair reading of the decision nor is it consistent with existing EPA rules. Those rules are clear that, where a unit has already begun "normal operations," past representative actual emissions are to be compared with actual annual emissions after the change. EPA's assertion that it may continue to apply an "actual-to-potential" test in calculating emissions increases for PSD purposes at facilities that have undergone non-"like-kind" replacements is completely untenable and must be abandoned.

Third, it is critical that EPA accept the fact that, under the plain language of both its NSPS and PSD regulations, in order for there to be a modification, the physical or operational change at issue must "result in" an increase in emission rate. It follows that, if a projected emissions increase is caused by factors that are independent of the physical or operational change -- for example, growth in electricity demand or changes in the loading order to meet environmental requirements -- new source review would not be triggered. EPA's acceptance of this key point would have the beneficial effect of alleviating the Agency's inappropriate focus on whether proposed changes at a facility are followed by increased capacity utilization.

Fourth, with respect to NSPS applicability determinations, EPA should recognize that the use of nonrepresentative emissions (e.g., rates reflecting deteriorated equipment) is not an appropriate method of establishing the pre-change baseline. Rather, in setting the pre-change maximum hourly emission rate for a unit, EPA should use the maximum hourly rate that could be achieved by the unit over its previous five years of operation.

Fifth, EPA has already indicated that it should and will soon be providing needed guidance on the meaning of "routine maintenance, repair, and replacement." Such activities are specifically exempted from EPA's regulatory definition of "modification," but the regulations do not specify precisely what is meant by "routine." Considerable uncertainty, delay, and, on occasion, controversy, has resulted from the ambiguities attendant to the precise meaning of "routine." In the WEPCo case, for instance, it took EPA 16 months to process the utility's "applicability" request. In promulgating this badly needed guidance, EPA should follow the principle that "routine" maintenance, repair, and replacement includes those activities that, in standard industry practice, are to be expected throughout the useful life of a unit. For electric utility units, such activities would include those typically required at a unit that will operate 55 to 65 years, the useful life for utility units that was assumed by EPA in all its analyses of the Clean Air Act legislative proposals. EPA's new rule on "routine"

maintenance, repair, and replacement should reflect the common-sense idea that well-maintained plants are not only more efficient producers of electricity, but experience fewer operational upsets as well, thereby causing fewer environmental problems.

As my preceding comments make evident, I do not believe that § 5101, the so-called "WEPCo-fix" in S. 341, is at all adequate to accomplish the goals that I have briefly outlined today. It only addresses the pollution control issue. Whether more expansive legislation is necessary will be largely driven, of course, by whether EPA, consistent with its October 26 commitment, eventually develops a new interpretation of its WEPCo position that is consonant with the Administration's original legislative proposal. We urge the Committee to include in S. 341 broad WEPCo relief like that sponsored by you, Mr. Chairman, and 30 of your colleagues last fall. A provision providing broad relief could be deleted in any final bill if EPA follows through adequately on its prior commitment. However, if the matter is not adequately addressed, meaningful legislative relief from WEPCo will be needed to realize the broad energy objectives of this legislation.

The CHAIRMAN. Thank you, Mr. Ahern.

Mr. Hawkins, would you agree with me that BACT is not clear in its requirements as far as what technology it would require for a new power plant, that it would require in effect an individual review of each plant?

Mr. HAWKINS. BACT, Mr. Chairman, was put in the law in 1977 to deliberately be an evolving concept, so that technology would not be frozen in time. The Congress had sufficient evidence in 1977 that EPA's rulemaking for new source performance standards proceeded so slowly that new plants were being built and being subjected to outdated and inadequate technology definitions.

If it is of any help, it is not only in the area of WEPCo that EPA's regulations move slowly. They have moved slowly in setting new source performance standards.

The CHAIRMAN. Then your answer would be yes, for the reasons you just said? It is uncertain?

Mr. HAWKINS. Well, it is not constant. EPA maintains a clearinghouse——

The CHAIRMAN. Is that different from uncertain?

Mr. HAWKINS. Well, I think so, because I think that the uncertainties can be caused by revisions of existing rules, just as they can be caused by a case by case determination of what is the best available technology.

The CHAIRMAN. Well then, how would you determine what is the BACT for a change in an existing facility?

Mr. HAWKINS. If a change is a modification, then it is required to evaluate what technologies would do the best job of controlling emissions from that facility. And if it chooses a technology that is less effective, then it needs to justify that less effective technology as being based on a consideration of the costs and technical feasibility at that site.

The CHAIRMAN. Is it not fair to say that that is uncertain? It may be desirable for it to be uncertain in your view, but it is uncertain clearly, is it not?

Mr. HAWKINS. It is more uncertain than a fixed rule that would apply all the time, yes.

The CHAIRMAN. Then it is certainly more uncertain than section 407?

Mr. HAWKINS. Section 407 of the 1990 law I would argue is quite uncertain at this point. It specifies that EPA has to set regulations for NO_x control at the higher of the rate that is available through the use of low-NO_x burner technology or certain specified limits for certain specified boiler types.

If I were a power plant operator now, I would not know what the maximum emission rate that EPA might wind up setting.

The CHAIRMAN. But it is generic. It is across the board. It is not individual plants.

Mr. HAWKINS. Once EPA gets those rules written, yes, it will be a generic rule that is applicable to existing sources.

The CHAIRMAN. You would also agree with me that individual plant evaluations do take, what, 18 months to 3 years to make?

Mr. HAWKINS. I do not know what the EPA average is on the BACT or the State average. It is a component of the entire air quality permitting process.

The CHAIRMAN. What would you say for the timetable on that, Mr. Ahern?

Mr. AHERN. Well, as I have indicated in the example of Pennsylvania, Mr. Hambright studied the last 17 reviews and it took an average of 470 days.

The CHAIRMAN. Well, it seems to me, whatever technology is going to be required, that we ought to try to find a way to make as much certainty and predictability as we can. And it seems to me that the present situation is clearly uncertain and clearly delayed beyond what it needs to be.

That is why we specify section 407 rather than have the individual review. Do you object to that specification of section 407 criteria?

Mr. HAWKINS. If that is addressed to me, Mr. Chairman, yes, we do, because to us it is the wrong target. The section 407 standards were expressly made to be lenient to reflect the fact that they were being applied to existing facilities. The specification in S. 341 would apply them to any modified facility, no matter how extensive the modification was.

It could be, for example, taking a boiler, ripping out the bottom of it, and turning it from a pulverized coal boiler into a fluidized bed combustion boiler. That is a major change. It is essentially a new facility, and yet under this language it would be allowed to comply with the lenient section 407 rules, which were designed to be achievable on a cost effective basis at existing facilities.

The CHAIRMAN. Would that not trigger the reconstruction rule?

Mr. HAWKINS. Not if it was less than 50 percent of the replacement cost of the facility, which the specific example I mentioned could well be.

The CHAIRMAN. Now, with respect to the potential-to-potential rule, for the purpose of evaluating PSD and nonattainment, right now existing plants are considered to be 100 percent, operated at 100 percent capacity, are they not?

Mr. HAWKINS. For the PSD baseline, Mr. Chairman, existing plants are operating at their actual rates, and if they subsequently increase emissions after the baseline date is triggered then that is what we call consuming increment. It creates a real increase in air pollution and that is eating up the PSD growth allowance, if you will. And if enough of it happens, a State can be required to revise its State implementation plan.

So that a new plant or a modified plant that goes through the PSD permitting process, that is evaluated at 100 percent capacity. The ones we are concerned about are the ones that did not go through the PSD permitting process. Their actual impact on air quality is based on their actual emissions.

The CHAIRMAN. Well, it is my understanding that they are put in the PSD inventory at the design capacity.

Mr. HAWKINS. Only for the ones that are permitted under the PSD program. But the EPA's rules, which are in 40 CFR 51.166.B.13—I thought this might come up, so I checked it today—provide that existing sources consume increment if they increase their operations and increase their emissions as a result.

The CHAIRMAN. Now, Mr. Ahern, tell me about, if you wanted to go to low sulfur coal, what types of physical changes must a power plant make to go to western low sulfur coal?

Mr. AHERN. To convert a unit that was probably designed for eastern fuel to western fuel, you typically have to address three areas. One is in the fuel-handling area. Often western fuel is dustier. You are concerned about fugitive emissions and you will need to make changes to make sure that there is not an increase in fugitive emissions.

The second is usually the combustion characteristics of the furnace need to be modified in some way, and this could be anything from additional slag blowers to possibly some heat transfer surface modification.

And the third area is in the area of ash disposal and ash removal. Sometimes it is necessary to make substantial changes to the ash collection system in order to accommodate the different characteristic ash that comes with western coal.

The CHAIRMAN. How would that compare with the cost of a scrubber retrofit?

Mr. AHERN. Well, that would be very site-specific. I could give you an example for one of our facilities that we are looking at, where at a very large plant the installation of scrubbers, we estimate, would cost $800 million to install scrubbers, but the associated changes for a fuel switch would be on the order of $200 million.

The CHAIRMAN. What is your guess as to whether converting to low sulfur coal in order to comply with the Clean Air Act would trigger WEPCo?

Mr. AHERN. I do not know that we know what the answer is, but we have got serious concerns that it is going to. We do not know for sure that it will, but with the way the WEPCo policy has emerged ad hoc, we believe it very likely could.

The CHAIRMAN. Is there anything short of our legislation—I am wondering whether or not there is any compromise here that can be reached to give a little certainty, predictability, and do away with some of what most would consider to be unnecessary expenditures. Is there a compromise out there anywhere, or are we stuck with this uncertainty and this difficulty?

Mr. HAWKINS. Well, interestingly enough, Mr. Ahern and I were talking before the hearing and—I will speak for myself—I found it to be a helpful conversation. He was able to articulate specific concerns that he had and I felt that I was able to articulate specific concerns that matter to our community.

And as I say, if I am in a helpful conversation it indeed suggested that maybe we ought to have more such conversations.

Mr. AHERN. Mr. Chairman, I would characterize at least my understanding of the utilities' situation as that if new source review is required we have got major problems from a time standpoint, as in this particular case with the Clean Air Act.

So although we might be able to agree that if new source review was required, what could be some of the parameters for this test of actual to potential and things like that? The very fact of being driven into a point of needing to do a new source review is going to cause serious problems with compliance with the Clean Air Act. So that is where I see some impediments to resolving the issue.

Mr. HAWKINS. If I might continue, I think that is a valid point, and it argues for creating some categories of activities that are not put into the new source review. And I think that this also responds to Senator Conrad's question earlier about what you would do to advise companies that are trying to comply with acid rain.

I would advise them to read the letter that EPA sent to the Northern Indiana Public Service Company with respect to the Bailey generating facility. Unlike the promised interpretive rules, that is a real document. It does not say "draft" on it, and it states the agency's position, and that position is that pollution control projects that are environmentally beneficial are not going to be subject to new source review.

I think that is advice that companies could rely on, and if they wanted additional certainty they could seek a similar specific letter for their facilities saying that the same principle articulated in that document would apply.

Now, I am not arguing that this program ought to be implemented through a series of letters. I do not think it should be. But I do think that it is possible to identify certain types of activities that we and the industry could agree did not have to go through full-blown new source review as long as there were criteria to check against air quality impacts and as long as we were not eroding the objectives of long-term air quality improvement.

The CHAIRMAN. Because the problem is they are going to be wanting to operate it at a higher rate in order to recover that investment, and that is going to trigger that rebuttable presumption, which would be rebutted in almost every case, would it not?

Mr. HAWKINS. Well, again, the one thing that companies can use to get out of review is to show that there will be no emissions increase even at a somewhat higher rate. So for example, if a company decided that it wanted to operate a generating unit at a 5 percent higher capacity factor or a 10 percent higher capacity factor in order to recoup, in order to make cost effective use of the new scrubber, for example, it could do so, and it would have to notch down its controls on the other pollutants in order to come out even.

And if it came out even, under the EPA NIPSCO letter it would be deemed environmentally beneficial and it would not be subject to new source review.

The CHAIRMAN. Would you support a WEPCo fix for fuel switching in order to comply with the Clean Air Act Amendments of 1990?

Mr. HAWKINS. I would support an administrative interpretation that includes that as a pollution control project, yes.

The CHAIRMAN. Suppose the power plant had to be modified to accommodate the new fuel. Would you still do it?

Mr. HAWKINS. As long as it is environmentally beneficial, meaning no increase in actual emissions, that would be agreeable, that would be acceptable to us.

The CHAIRMAN. Let me say I appreciate what you say, Mr. Hawkins. I know you appreciate the problems that Mr. Ahern is talking about. There ought to be a way to find a sensible compromise on this.

I mean, I hear what you say when you say that this is going to trigger all these committees. I mean, I know that there are ways to

oppose this on what we are trying to do. We are not trying to dirty up the air. We are trying to give some predictability. We are trying to save companies billions of dollars.

There is not an unlimited pool of money to comply with clean air, and if you want to waste it on unnecessary things it is in my judgment wasted, as opposed to being applied to the best purpose. So we ought to be able to find something here that is workable and is a compromise that we can work with.

Our staff will be available to that purpose, if you think that that could be fruitful. I mean, I would like to go at the WEPCo fix problem with a view to really trying to solve the problem.

Nobody needs this issue. It is too complicated anyway to explain to people most places. We need a fix, a fix that works and a fix that is environmentally sound.

So I would urge you to continue your talks and to maybe come to us, talk to us and the staff.

Senator Craig.

Senator CRAIG. Thank you very much, Mr. Chairman.

I think the chairman has articulated the intent and goal of this committee and what is embodied in S. 341 and what we would like to get accomplished. And to make it all the more difficult simply does not solve the problem; it exacerbates the problem well beyond what it is, and it is probably worse than any of us ever anticipated it might be.

I have no questions, Mr. Chairman. But I certainly would encourage both of the parties reflected in the testimony of these two gentlemen to work with us as closely as they can to resolve it.

Thank you.

The CHAIRMAN. Senator Wellstone.

Senator WELLSTONE. Thank you, Mr. Chairman.

Everybody is using the word "compromise" and I certainly do hope something can be worked out. Let me just ask a couple of questions of you, Mr. Hawkins, which speak to some differences I believe I heard between your testimony and Mr. Ahern's.

Maybe there can be a common ground, but I am trying to understand this question better. And I quite agree with everybody who says it is complicated. I am still trying to learn what some of these acronyms mean, for example.

Will EPA's current practice inhibit the introduction of scrubbers for pollution control? I thought that I heard Mr. Ahern say that that is what would happen.

Would it inhibit the introduction of a switch to cleaner fuel? And would it inhibit improving efficiency in electrical generation? I thought I heard Mr. Ahern say that and I want to find out whether or not you agree, Mr. Hawkins.

Mr. HAWKINS. Well, Senator, I believe that EPA's current policy will not inhibit any of those actions, and I think that is what EPA was attempting to accomplish when it wrote the letter that it did to the Northern Indiana Public Service Company, which covered the installation of a scrubber and told that company that, because they had looked at the facts and concluded that it was environmentally beneficial, that they were advising that it would not be covered under new source review.

And they then said, we will put out an interpretive rule, which they then proceeded to draft, and that was overtaken by a legislative proposal in the last Congress.

But I do not know whether other companies have solicited similar assurances from EPA, so I cannot—I do not know whether EPA has responded. But it seems to me that that company needed an answer and it got one. And I am sure that people can argue, correctly, that it should have gotten one sooner, but it did get one and it got one on the specific types of activities that you are talking about.

Senator WELLSTONE. Mr. Ahern, do you have a different interpretation?

Mr. AHERN. Well, I think one of the concerns, Senator Wellstone, one of the concerns that I think the industry has is that the allowance trading system, the market-based approach which broke the mold of the command and control approach, it encourages people to shift their utilization around in a way that tries to optimize the mix of emissions and costs.

One of the things I think that many people who put scrubbers in would want to do—in fact, part of their economics would be based on it—would be increasing the utilization or the capacity factor of the units where they put on the scrubbers. And I think this is where they feel vulnerable to the charge that it is necessary now to go through a new source review, and this is why the industry I think believes that there is tremendous uncertainty, and this uncertainty needs to be resolved.

The CHAIRMAN. If you would yield. I think this is a very key question you are on, but is it not correct that if you did put on the scrubber and you used it 100 percent of the time—nobody uses it 100 percent; assume 100 percent, as opposed to maybe before they were using it only 20 percent of the time, as a peaker—then that is going to trigger a new source review, is it not?

Mr. HAWKINS. Well, Senator, actually I have a hard time concluding that it will. Let me just try to real quickly. For sulfur dioxide, if a unit is going to put on a scrubber it is undoubtedly going to be one that is going to get 70 to 90 percent removal or better than that. And if it is 70 percent removal, you would have to triple the operating capacity to just come out even, and I think that is going to be an unusual scenario, to triple your utilization.

With respect to the other two pollutants, the nitrogen oxide requirements are triggered at the same time as the Phase I SO-2 requirements. So they will be going from an uncontrolled nitrogen oxide rate to a controlled nitrogen oxide rate under section 407. And I think there it is also implausible that there would be an emissions increase even if there is a utilization increase.

Finally, for particulate matter, particulate matter is a very highly leveraged—is a very highly leveraged pollutant, because the controls on particulate matter operate at 95, 96, 98, 99 percent efficiency, which means that a tiny, a fraction of 1 percent improvement in removal can more than compensate for a 20 percent, 30 percent increase in operating capacity. You will still wind up with no net emission increase.

So I think that it would be unusual, and indeed it is hard for me to come up with a calculated situation, where you would have

under the acid rain program an increase in emissions if you are installing a scrubber and if you are putting low-NO_x burners on.

Mr. AHERN. Mr. Chairman, Senator WELLSTONE. We have got situations with units in Phase I where their NO_x requirements do not kick in until Phase II. Cyclone-fired units, wet-bottom pulverized coal-fired units, and units with cell burners, NO_x emission limitations do not apply to those units until the year 2000. So those units will not be making their NO_x reductions.

And indeed, even if we wanted to move early to get them to meet those NO_x reductions, we do not know what the requirements are going to be. The regulations for Phase II are not supposed to be promulgated until 1997.

So clearly we feel vulnerable on the NO_x aspect.

Senator WELLSTONE. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. If they are not covered by section 407 until the year 2000, could we do a carve-out for those in the meantime, a special exception for them?

Mr. AHERN. Perhaps. I do not feel I can adequately answer your question here, Mr. Chairman.

Mr. HAWKINS. There is some flexibility in section 407 that could be used to address this type of situation. For example, the section 407 allows units to operate at higher than the prescribed NO_x rates provided that others operate at lower than the prescribed rates. So it allows an emission rate averaging approach, if you will, and that kind of flexibility could be used.

What I think this exchange indicates is that on this particular set of facts what it boils down to is the implementation difficulties of controlling NO_x a few years earlier than the statute, the statutory compromise, provided. And I will certainly agree that the company needs to know whether the NO_x controls they put on will meet the regulations that EPA comes out with.

But I expect there are ways to get a virtually certain degree of assurance on that.

The CHAIRMAN. Well, how can you be sure that the regulations will not be contested and overturned in court?

Mr. HAWKINS. Well, the discretion that is accorded to the Administrator under section 407 to set NO_x control requirements is very broad, and the case law on challenging agency discretion is extremely favorable to the Government. Essentially, it says that the statutory interpretation does not even have to be reasonable as long as it is permissible.

So the judges do not have to agree with the statutory interpretation. They only have to find that it is permissible. Some of us have called this the "off the wall" test: If the answer is not off the wall, the Government wins. And the history of this is I do not believe there have been any successful environmental challenges of EPA's new source performance standard-setting or other technology-based rulemakings. I cannot think of any offhand.

The CHAIRMAN. Well, we will continue to study this question. I think it is a very serious matter, and I know, as Senator Conrad talked about, there are tens of millions of dollars at stake for individual plants. They need a decision. They need certainty, and they also need to apply their resources most efficiently, and I fear that

under the present law and present regulations that is not being done.

Now, our legislation is one fix. It may not be a perfect fix, but it is at least our view of what that fix would be, taken in tandem with what EPA says that they would do.

I want to again issue the invitation to both of you and to the environmental community as well as the industry to help us work this thing out if we can. We want to do it as quickly as we can. We do not want to get a legislative fix that takes years to get and then we do not end up getting it, we just maybe sort of poison the atmosphere for working it out in terms of rules. That is a concern as well.

So with that, I want to thank the witnesses today very much for your testimony. You have been very helpful.

[Whereupon, at 3:33 p.m., the hearing adjourned.]

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